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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BARBARA J. WIED,

Petitioner

v.

VALHI, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit state courts to allow a representative plaintiff, without notice to the absentee class members, to effect a settlement of a class action in which the representative plaintiff obtains a personal profit of approximately $20,000,000 and agrees to cooperate to accomplish the dismissal with prejudice of the claims of the absentee class members?

2. Does a representative plaintiff give absentee class members representation adequate under the Due Process Clause of the Fourteenth Amendment to the United States Constitution where he negotiates and enters into a settlement agreement wherein he agrees to cooperate to cause the dismissal with prejudice of the class action and by the same agreement the representative plaintiff obtains a personal profit of approximately $20,000,000 and then effects the dismissal without notice to the absentee class members?

3. Where a representative plaintiff institutes a class action and then negotiates and enters into a settlement agreement wherein he agrees to cooperate to cause the dismissal with prejudice of the class action and by the same agreement the representative plaintiff obtains a personal profit of approximately $20,000,000 and then effects the dismissal without notice to the absentee class members, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require a state court to hold the representative plaintiff accountable for the personal profit as an inadequate class representative and for failure to give notice?

4. Where a representative plaintiff institutes a class action and then negotiates and enters into a settlement agreement wherein he agrees to cooperate to cause the

dismissal with prejudice of the class action and by the same agreement the representative plaintiff obtains a personal profit of approximately $20,000,000 and then effects the dismissal without notice to the absentee class members, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit a state court from "curing" the representative plaintiff 's abandonment of the representative plaintiff 's fiduciary duty by an "*ex post facto* hearing" at which the trial court views the representative litigation as an individual action after another class member by chance discovers the agreement to abandon and the personal profit and brings the facts to the attention of the state court?

LIST OF PARTIES

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No.

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October Term, 1983

BARBARA J. WIED,

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v.

VALHI, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner Barbara J. Wied ("Mrs. Wied") repectfully prays that the Court issue a writ of certiorari to review the Opinion of the Supreme Court of the State of Delaware ("the Delaware Supreme Court"), dated July 29, 1983 ("the Opinion"), and the Order and Judgment which the Delaware Supreme Court entered on September 28, 1983.

OPINIONS BELOW

The Opinion is reported at 466 A.2d 9 and is reproduced in the Appendix to this Petition at pages A1 to A16.[1] The trial court, the Court of Chancery of the State of Delaware ("the Trial Court"), filed five unreported let-

1. Petitioner cites to her Appendix as "A" followed by the page and, where helpful, the paragraph reference.

ter opinions, dated February 26, 1982 (A17-A23), September 22, 1980 (A24-A25), March 6, 1980 (A26-A29), October 30, 1979 (A30-A31), and October 22, 1979 (A32), respectively.

JURISDICTION

After the Delaware Supreme Court filed the Opinion, Mrs. Wied on August 12, 1983, timely filed a Motion for Reargument Pursuant to Rule 18 and Motion for Rehearing *En Banc* Pursuant to Rule 4 (A35-A58), which the Delaware Supreme Court without opinion denied by Order entered September 28, 1983 (A34). On the same day, the Delaware Supreme Court entered the Order and Judgment (A33). The Court's jurisdiction to review the judgment below is invoked under 28 *U.S.C.* §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1 of the United States Constitution, in pertinent part provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1257 of Title 28, United States Code, in pertinent part provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or

claimed under the Constitution . . . of . . . the United States.

Rule 23 of the Trial Court, which governs class actions, in pertinent part provides:

> (a) Requisities to Class Action.
> One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.
>
> * * *
>
> (e) Dismissal or Compromise.
> A class action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs; except that if the dismissal is to be without prejudice to the class or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made.

Rule 23.1 of the Trial Court, which governs derivative actions, in pertinent part provides:

> . . . The action shall not be dismissed or compromised without the approval of the Court and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the Court directs; except that if the dismissal is to be without prejudice or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from

any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made.

STATEMENT OF THE CASE

Valhi, Inc. ("Valhi"), a privately held corporation, filed a representative action asserting derivative and class claims on October 30, 1978, in the Trial Court as part of its strategy in a proxy fight against the management of PSA, Inc. ("PSA"), a publicly held corporation whose stock was traded on the New York Stock Exchange. In its proxy fight materials Valhi promptly told the other PSA stockholders that it had sued as their representative.

When Valhi lost the proxy fight in December, 1978, it entered into negotiations with PSA to "settle" the litigation. In the negotiations, Valhi never once tried to achieve a benefit for anyone other than itself. Valhi did not disclose at any time, either to the Trial Court or the class members, that it entered these negotiations seeking to obtain a profit only for itself. The negotiations focused upon what consideration Valhi alone would receive from PSA in exchange for the 700,000 shares of PSA stock which Valhi owned and which constituted approximately 20 percent of PSA's then outstanding stock.

Despite Valhi's obligations as a fiduciary to the class members and the representations it had made in its complaint that "Valhi will fairly and adequately protect the interests of the class," Valhi offered no objection whatsoever to PSA's condition in the settlement negotiations that "PSA would want a dismissal with prejudice" of the representative litigation.

On February 1, 1979, on Valhi's motion, the Trial Court, without any notice to the stockholders of PSA, permitted Valhi to amend the representative complaint to drop all the derivative claims and, as well, to drop as parties the directors of PSA. At the same time, Valhi as the representative plaintiff continued to assert the class claims in its amended complaint and alleged yet again that it "will fairly and adequately protect the interests of the class." In doing so, Valhi kept secret that it was in

the midst of settlement negotiations which focused upon the achievement of a personal profit for Valhi and contemplated the abandonment of the class claims with prejudice.

The day after Valhi dropped the derivative claims and discontinued the derivative action against the individual defendants, Valhi reached an oral agreement to settle with PSA. Valhi in the first instance prepared the settlement papers in which on February 5, 1979, Valhi proposed:

> . . . Valhi will take no steps to oppose PSA's attempts, if any, to dismiss the Delaware action with prejudice as to the plaintiff class.

PSA in response proposed that Valhi involve itself as the class representative along with PSA in achieving the dismissal with prejudice of the class action:

> . . . Commencing with the date of this Agreement, Valhi and PSA shall exert their best efforts to take all steps necessary to obtain the dismissal with prejudice of the Delaware action as to the purported plaintiff class on the Closing Date.

The final settlement agreement which Valhi and PSA signed on February 21, 1979, in pertinent part provided:

> . . . Valhi and PSA shall cooperate to accomplish to the extent possible the dismissal with prejudice of the Delaware action as to the purported plaintiff class on the Closing Date.

On February 21, 1979, Valhi's 700,000 shares of PSA stock had a market value of $11,900,000 based upon the closing price of $17 per share for PSA common stock traded on the New York Stock Exchange. The consideration which flowed to Valhi in the private settlement consisted of (1) four Boeing 727-200 aircraft with an appraised total value ranging between $26,000,000

and $30,000,000 in April, 1981, and (2) the rental income of $8,712,000 from a lease of the four aircraft to PSA which lease was to expire in April, 1981. Thus for its 700,000 PSA shares with their stock market value of $11,900,000, Valhi would receive between $34,712,000 and $38,712,000, or a personal profit of approximately $20,000,000 even after discounting the profit to present worth.

On February 21, 1979, PSA issued a press release and on February 23, 1979, PSA sent an information letter to its stockholders concerning the settlement with Valhi. Neither document disclosed Valhi's personal profit of approximately $20,000,000 or Valhi's agreement to cooperate to cause the dismissal with prejudice of the class action.

On February 22, 1979, Valhi and PSA conferred with the Trial Court who suggested that since the Trial Court had not certified Valhi's representative action as a class action, Valhi was free to amend its complaint yet again and drop the class action allegations. Valhi did not give the Trial Court a copy of the private settlement agreement nor disclose the terms of the private settlement including its personal profit and its agreement to abandon the class. The Trial Court did not require that Valhi or PSA give notice of the private settlement and its terms to the class members. On April 16, 1979, the Trial Court entered the formal Order permitting Valhi to file its second amended complaint. Although it abandoned the claims of the class members, Valhi, in its second amended complaint, retained the identical claims for itself alone, apparently as leverage in the event PSA failed to conclude the private settlement.

On August 31, 1979, Mrs. Wied, the owner of 25 PSA shares, served and filed her Motion to Intervene (A59-A66) seeking to vacate the Orders the Trial Court had entered on February 21, 1979, and April 16, 1979 ("the Prior Orders"), and the amended complaints

which Valhi had filed. In her motion, Mrs. Wied set forth in detail the facts of Valhi's inadequacy as the representative plaintiff and the failure to give notice, facts she had learned in the course of discovery in an action she had filed in California charging Valhi with violation of Section 16(b) of the Securities Exchange Act of 1934, 15 *U.S.C.* §78p(b). Mrs. Wied pointed to: (1) the personal profit Valhi stood to make from the settlement of between $20,000,000 to $24,000,000 (A61, paragraph 5); (2) Valhi's agreement "to cooperate to accomplish to the extent possible the dismissal with prejudice of the Delaware action as to the purported plaintiff class" (A64, paragraph 14[3]); (3) Valhi's failure to inform the Trial Court of the settlement negotiations when Valhi sought to amend the representative complaint to drop the derivative claims and the individual defendants on February 1, 1979 (A62, paragraph 8); (4) the failure to give notice of Valhi's actions to the PSA stockholders (A62-A63 and A64, paragraphs 11 and 15, respectively); (5) the impermissibility of a representative plaintiff making a personal profit by a settlement of the representative action (A64-A65, paragraph 17); and (6) Valhi's breach of "the fiduciary responsibilities it undertook when it filed the Complaint alleging wrongdoing both derivatively and as a class action against PSA and the individual director defendants. . . ." A65, paragraph 18.

Over Valhi's opposition, the Trial Court on October 22, 1979, ruled, as Mrs. Wied had urged, that Valhi as the representative plaintiff could not dismiss the class action without notice to the other stockholders. In so ruling the Trial Court said (A32):

> . . . the inability or inadequacy of representation in a case such as this is not limited to the caliber of the attorney whom an existing plaintiff has retained, but also includes the position and knowledge of the existing party vis a vis the applicant for intervention. [Citing cases.]

In granting Mrs. Wied's Motion to Intervene and rescinding the Prior Orders, the Trial Court held (*ibid.*): "Such actions [i.e., representative actions] are now controlled by either Rule 23 or Rule 23.1."

Thereupon, Valhi on October 26, 1979, filed a motion to withdraw as the representative plaintiff and brought the motion on for hearing on October 29, 1979. Valhi argued that Mrs. Wied's intervention insured the continued prosecution of the representative action and thus would enable Valhi to consummate its private settlement with PSA. Valhi further argued its dismissal did not require notice to PSA stockholders. Mrs. Wied opposed Valhi's effort to place itself in the position of retaining the personal profit of approximately $20,000,000 from an agreement it had negotiated and entered into while serving as the class representative. After quoting from Valhi's complaint in which Valhi had alleged that it had brought the litigation derivatively and as a class action and represented that "Valhi will fairly and adequately protect the interests of the class," the Trial Court, on October 30, 1979, exactly a year after Valhi had filed its representative complaint, issued its letter opinion (A30-A31) and ruled (*idem*, at A31):

> Having considered the original complaint and what I deem to be relevant facts now before the Court as well as having heard argument of counsel on the motion of Valhi for leave to withdraw as a party plaintiff in this action and concluded that the action proposed by Valhi must be viewed in the light of the fact that Valhi brought this action in a fiduciary capacity for the benefit of all of the stockholders of PSA other than the individual defendants, I conclude, in the exercise of my discretion, that action on such motion to withdraw must be deferred until Court-approved notice of such application is given to the stockholders of PSA and a time fixed for the Court to hear objections or suggestions

> of such stockholders as to the pending motion of Valhi, Rules 23, 23.1 and 21.
>
> Following such hearing, the Court will determine whether or not Valhi's motion for leave to withdraw as a plaintiff should be granted, and if so, on what terms and conditions, such as the possible right of the stockholders of PSA, other than the individual defendants, to share in the proposed settlement on which Valhi relies, on a trust theory. I also conclude that the fact that class action certification did not precede Valhi's application does not mean that said application is free of the requirements of Rules 23 and 23.1. [Citations omitted.]

The Trial Court, by its rulings of October 22 and 30, 1979, following Mrs. Wied's Motion to Intervene, thus re-established the due process protections of notice and adequate representation which the Trial Court's Rules 23 and 23.1 afford.

On October 31, 1979, Valhi withdrew its Motion to Withdraw but six weeks later renewed it. While the Trial Court still had under advisement the substance and form of the notice which it desired to send to the PSA stockholders and class members on Valhi's renewed Motion to Withdraw, Valhi closed the private settlement with PSA on February 26, 1980.

As Valhi was implementing the private settlement, Mrs. Wied engaged in settlement discussions with PSA and was successful in securing a settlement with PSA of the class claims which Valhi had originally asserted and then abandoned in the private settlement. The settlement involved another vote by the PSA stockholders on the "porcupine" charter amendments and a reduction in the percentage of the super-majority provision. The Trial Court, on notice to the PSA stockholders, approved the settlement at a hearing on June 3, 1980.

Mrs. Wied moved to impose a constructive trust upon Valhi's personal profit pursuant to the Trial Court's October 30, 1979 ruling. Valhi opposed the motion. Valhi and Mrs. Wied submitted proposed forms of notice of the hearing. In her notice, Mrs. Wied proposed disclosing to PSA stockholders and the class members Valhi's conduct as the representative plaintiff but the Trial Court rejected her notice for Valhi's proposal which did not disclose the facts as to Valhi's conduct. The Trial Court on notice held a hearing in April, 1981, which it regarded as an "*ex post facto* hearing" on the "fairness" of Valhi's settlement with PSA. A24-A25. At the hearing, Mrs. Wied objected to all evidence as to "fairness" since such evidence was irrelevant given the undisputed facts as to Valhi's conduct as the representative plaintiff. *See infra* at 14-17, 19 and 21-23. The Trial Court noted Mrs. Wied's objection and proceeded to accept testimony as to "fairness." A50, paragraphs 28(8) and (9).

On February 26, 1982, the Trial Court issued its letter opinion ruling in favor of Valhi. A17-A23. In doing so, the Trial Court ignored Valhi's fiduciary responsibility as the representative plaintiff and erroneously viewed the litigation as if Valhi had brought a private cause of action (A19 and A19-A20, respectively):

> Accordingly, the issues presented at the inception of this case were (1) whether or not PSA was justified in seeking to repel the overtures being made by Valhi by means of the adoption of so-called "porcupine" provisions proposed to be voted on at the stockholder meeting scheduled for November 20, 1978, (2) whether or not PSA might properly seek to repel the overtures made by Valhi through the purchase of the shares held by Valhi in PSA, Kors v. Carey, 58 A.2d 136 (1960), and Cheff v. Mathes, Del. Supr., 199 A.2d 548 (1964), and (3) whether or not Valhi could properly sell its PSA stock to PSA.
>
> * * *

> . . . At this juncture it is indeed ironic that this long-pending case would have undoubtedly been proven to be unnecessary had Valhi and PSA proceeded directly into negotiations for the purchase and sale of the 700,000 PSA shares owned by Valhi without the resort to litigation.

The fact is Valhi never tendered any of the foregoing issues when it filed its representative complaint on October 30, 1978. Compare A19 and A19-A20 with A55-A57, paragraph 32. The fact is Valhi filed a representative litigation claiming to represent others similarly situated and asserting claims on their behalf without a single reference in its complaint to the "propriety" of PSA's buying or Valhi's selling the PSA shares Valhi, the representative plaintiff, owned. The Trial Court erroneously transformed Valhi's representative action into a private one ignoring the facts and the applicable law.

In its February 26, 1982 letter opinion, the Trial Court did not test Valhi's conduct and what had taken place as it had in its letter opinions of October 22 and 30, 1979. Valhi's large holding of PSA stock convinced the Trial Court that Valhi could not "be charged with bringing a strike suit" (A20). The Trial Court did not once refer to its October 30, 1979 ruling that Valhi's Motion to Withdraw in order to close its agreement with PSA "must be viewed in the light of the fact that Valhi brought this action in a fiduciary capacity for the benefit of all of the stockholders of PSA other than the individual defendants" (A31). The Trial Court regarded the evidence at the "*ex post facto* hearing" as establishing "the entire fairness of [the] transaction" and held "that Mrs. Wied's objections to [the] transaction in her application for the imposition of a constructive trust . . . must be denied." A20. The Trial Court held (A20-A21):

> I say this because while it is clear that a fiduciary may not make a profit at the expense of those for whom he sues, Cohen v. Beneficial Industrial

> Loan Corporation, 337 U.S. 541, and Young v. Higbee Company 324 U.S. 204 (1945), I am not persuaded that Valhi made any profit to which the other stockholders of PSA are entitled on a trust theory.

Although it referred to *Young v. Higbee Co.*, 324 U.S. 204 (1945), the Trial Court in its holding did not refer to Valhi's secret negotiations for a personal profit and its abandonment of the class members and their claims while serving as the representative plaintiff, conduct which *Young v. Higbee Co.* addresses and condemns. Moreover, in reaching its conclusion that "Valhi received no *unfair* profit" (emphasis added) (A23), the Trial Court ignored the $8,712,000 rental income portion of Valhi's agreement. A57, paragraph 32(7).

As to the failure to give notice, the Trial Court ruled (A21-A22):

> And while the conduct of then opposing counsel as well as that of the Court cannot be condoned, in the former seeking and the latter granting approval to the filing of an amended complaint which removed the derivative and class action allegations from the original complaint without notice to the stockholders of PSA and without a hearing, I am satisfied that it was established at the April 14-16th, 1981 ex post facto hearing that the sale of its PSA stock by Valhi to PSA was entirely fair to PSA and its stockholders.[2]

Mrs. Wied appealed to the Delaware Supreme Court seeking to correct the Trial Court's "erroneous transformation of Valhi's representative action into a personal claim of Valhi." Mrs. Wied's Opening Brief on Appeal, at 9. Her belief was that the corrective action the class

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2. The Trial Court's reference to "an amended complaint" minimizes the fact that Valhi and the Trial Court twice ignored the due process protections which Rules 23 and 23.1 provide for absentee stockholders.

needed would follow once the Delaware Supreme Court corrected the Trial Court's skewed view of the case.

On Mrs. Wied's appeal, the Delaware Supreme Court on July 29, 1983, filed the Opinion affirming the decision of the Trial Court (A1-A16). After repeating verbatim the Trial Court's statement as to the issues Valhi's representative action "presented at the inception of this case" but without comment that the complaint did not in fact present a single one of these issues (*compare* A5 with A55-A57, paragraph 32), the Delaware Supreme Court held that: ". . . Valhi did nothing which prejudiced the claims of other PSA stockholders" (A12) and that, therefore, the imposition of a constructive trust was unwarranted (A11-A13).

> The determinative considerations in this facet of the action for the imposition of sanctions and a constructive trust are these: (1) the Trial Court permitted Valhi to amend the complaint in a manner which deleted originally asserted class and derivative allegations without any prejudice to their subsequent renewal; and (2) those same claims were in fact subsequently reinstated and then settled by Wied herself on a fair and reasonable basis. *** [A12]

The Delaware Supreme Court based its conclusion on the following findings:

(1) PSA's press release and its information letter "constituted a complete disclosure . . . of Valhi's action and intentions" (A11-A12), a factual finding contrary to the finding of the Trial Court. (The Opinion did not refer to the fact that neither document disclosed Valhi's agreement to cooperate to dismiss the class action with prejudice and Valhi's personal profit of approximately $20,000,000.) *Compare* A11-A12 with A50-A52, paragraph 29.

(2) " . . . timely corrective action by Court and coun-

sel satisfied the requirements of justice." A14. (The Opinion did not refer to the fact that absent Mrs. Wied's fortuitous appearance, Valhi's acts of self-dealing and abandonment of the class and its claims while serving as the representative plaintiff would never have come before the Delaware courts.) *Compare* A13-A14 with A43-A45, paragraphs 17-19.

(3) There was no evidence of causal or other type of relationship between Valhi's private settlement and Valhi's agreement to cooperate to dismiss the representative litigation with prejudice (A11) and, moreover, Valhi's personal profit of approximately $20,000,000 was not at the expense of those for whom Valhi sued (A14-A16). (The Opinion did not refer to the law that in the fiduciary relationship the only facts of causal relationship a beneficiary need establish to secure an accounting are that (i) the fiduciary served as such and (ii) the fiduciary bargained for himself while serving as the fiduciary. *See* discussion, *infra*, at 19 and 21-23.) *Compare* A11 and A14-A16 with A53-A55, paragraph 31, and A39-A45, paragraphs 8-20, respectively.

(4) The Trial Court properly tested the fiduciary's conduct by "entire fairness" and the business judgment rule. A16. (The Opinion put aside Valhi's fiduciary duty as the representative plaintiff to account for any profit and even ignored as had the Trial Court the $8,712,000 lease income Valhi received as part of its settlement with PSA.) *Compare* A15 with A57, paragraph 32(7).

(5) The "*ex post facto* Rule 23 fairness hearing," which the Trial Court held, was "in response to Wied's application" (A12). (The Opinion did not refer to the fact the record reflects Mrs. Wied's persistent effort to have the Trial Court hold a constructive trust hearing as it had ruled on October 30, 1979, should take place.) *Compare* A12 with A47-A50, paragraph 28.

The Delaware Supreme Court (as had the Trial Court) considered *Young v. Higbee Co., supra* (A12-

A13), which Mrs. Wied had cited in support of the imposition of a constructive trust, but purported to distinguish the case and its progeny on the ground the facts there evidenced prejudicial conduct (A13):

> . . . For example, in Higbee, the representative plaintiff received six times the value of his stock in return for dismissing the appeal of a representative claim with prejudice. In *Clarke v. Greenberg*, N.Y. Ct.App., 71 N.E.2d 443 (1947), the representative plaintiff received $9,000 for stock valued at $51.88 and released the directors from the derivative claim. In *Dabney v. Levy*, S.D.N.Y., 92 F. Supp. 551, 553 (1950), *aff'd*, 2d Cir., 191 F.2d 201, *cert. denied*, 342 U.S. 887 (1951), the plaintiffs executed a release of the derivative cause of action and transferred plaintiffs' shares valued at $204.88 in return for $21,000.

In distinguishing *Young v. Higbee Co.* and its progeny, the Delaware Supreme Court did not refer to the record fact that Valhi secretly negotiated a private settlement while serving as the representative plaintiff. Morover, the Delaware Supreme Court did not address the following record facts that Valhi as the representative plaintiff:

> (1) secured a dismissal of representative claims and dropped defendants on February 1, 1979, without disclosing its secret negotiations for itself;
>
> (2) amended its complaint on February 1, 1979, reasserting allegations that it "will fairly and adequately protect the interests of the class" without disclosing that at the very same time it was in the midst of negotiations which contemplated the dismissal of the class action with prejudice while it obtained an approximate $20,000,000 profit;
>
> (3) entered into a private settlement agreement providing for a profit only for itself while com-

mitting itself to cooperate to cause the dismissal of the class action with prejudice;

(4) kept the class claims for itself alone;

(5) gave no notice to the class members of its agreement to cooperate to dismiss the class action with prejudice and its personal profit;

(6) opposed the intervention of a class member who learned by chance of Valhi's wrongdoing; and

(7) objected to the striking of the Prior Orders and reinstatement of the original complaint.

Compare A12 with A59-A64, paragraphs 2-11 and 14-15, and A52-A53, paragraph 30. The Delaware Supreme Court did not mention the fact that if no one else had come along, the dropping of the representative claims without notice on February 1, 1979, and April 16, 1979, would have had the same practical effect as a dismissal of the action with prejudice, a result which Valhi had committed itself to accomplish in the same agreement which provided for its personal profit.

On August 12, 1983, Mrs. Wied filed a Motion for Reargument Pursuant to Rule 18 and a Motion for Rehearing *En Banc* Pursuant to Rule 4 (A35-A58). In her Motion, Mrs. Wied asserted (A38-A39), paragraph 7:

> If representative plaintiffs are free to disregard the due process requirements which they must observe and if courts regard the failure to observe the due process requirements as "procedural errors" capable of "rectification" (Slip Op., page 16), representative litigation ceases to have its intended therapeutic benefit and becomes the vehicle for personal profiteering by representative plaintiffs who would abandon "the fiduciary relation" for private gain as Valhi has done here. The motive of the fiduciary representative plaintiff is irrelevant — the harm is done.

See also, A36-A38 and A43-A44, paragraphs 2-6 and 17, respectively.

The Delaware Supreme Court *en banc*, by Order entered September 28, 1983, denied the Motion without any opinion. A34.

REASONS FOR GRANTING THE WRIT

1. The Delaware Supreme Court's Opinion Is In Conflict With Every Other Court Which Has Considered The Notice And Adequate Representation Obligations Of A Class Representative And Merits Review.

The facts evidence a case without precedent in American law where a representative plaintiff violates the Due Process Clause of the Fourteenth Amendment in failing to provide the constitutional protections of notice and adequate representation to absentee class members and a state court permits the representative plaintiff to escape without accounting for a personal profit of approximately $20,000,000[3] it secretly bargained for and secured while serving as the representative plaintiff. *Young v. Higbee, supra; Dabney v. Levy*, 191 F. 2d 201, 203-204 (2d Cir. 1951), *cert. denied, sub nom. Levy v. Dabney*, 342 U.S. 887 (1951); *Certain-Teed Products Corp. v. Topping*, 171 F.2d 241, 243 (2d Cir. 1948); *Young v. Potts*, 161 F.2d 597 (6th Cir. 1947); *Rothman v. Gould*, 52 F.R.D. 494 (S.D.N.Y. 1971); *Yaffe v. Detroit Steel Corporation*, 50 F.R.D. 481 (N.D. Ill. 1970); *Miller v. Steinbach*, 268 F. Supp. 255, 281, 283 (S.D.N.Y. 1967); *Clarke v. Greenberg*, 71 N.E.2d 443, 444-445 (N.Y.Ct.App. 1947); *Whitten v. Dabney*, 154 P. 312, 316-317 (Cal. Supr. 1915).

Absent review and remand for correction the Opinion stands as precedent for conduct by a representative plaintiff which is constitutionally impermissible. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-174 (1974), citing with approval *Mullane v. Central Hanover Bank &*

3. In the Petitioner's view, the obligation to account applies whether the personal profit is $20,000,000 or six cents.

Trust Co., 339 U.S. 306 (1950); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); 3B Moore's *Federal Practice*, ¶23.07[3], at 23-232 to 23-242. *See Young v. Higbee Co.*, *supra*, 324 U.S. at 213 (The Court said an unfaithful representative plaintiff must account for any profit, holding that representative plaintiffs "cannot avail themselves of the statutory privilege of litigating for the interest of a class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement."); *Meinhard v. Salmon*, 164 N.E. 545 (N.Y.Ct.App. 1929), cited in *Young v. Higbee Co.*, *supra*, 324 U.S. at 213, note 13; *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del.Supr. 1939) (Relying on *Meinhard v. Salmon*, the Delaware Supreme Court held a fiduciary accountable who acquired a gain for himself since the law "denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation."). Neither the Delaware Supreme Court nor the Trial Court cited to either *Guth v. Loft* or *Meinhard v. Salmon* although Mrs. Wied relied upon them in both courts. For the Delaware courts' discussions of *Young v. Higbee Co.*, *see supra* at 13 and 15-17.

2. The Fact That The Delaware Courts Have Violated Due Process Clause Protections In A Corporate Setting Makes Review Imperative.

The violation of Due Process Clause protections of public stockholders has taken place in the Delaware courts which exercise an influence on American corporation law and litigation far beyond the borders of

Delaware. Over 40% of the corporations listed on the New York Stock Exchange make Delaware their "home." Jennings, "Federalization of Corporation Law: Part Way or All the Way," 31 *Bus. Law.* 991, 992-993 (1976). Representative litigation is the most common of the forms of litigation in which the Delaware courts interpret Delaware corporation law. *See, e.g., Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. Supr. 1983); *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. Supr. 1981); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. Supr. 1978); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. Supr. 1977). The rulings of the Delaware courts thus affect millions of persons scattered throughout the country who hold stock in Delaware corporations. They are for the most part persons of average means who rarely, if ever, participate in the selection of the representative plaintiffs who come forward to champion their rights. These public stockholders, accordingly, must necessarily rely upon the Delaware courts to protect their rights. The Delaware courts in *Valhi* have permitted a representative plaintiff to bargain away the claims of absentee class members without notice for a personal profit. By failing to condemn such conduct and by testing it by "the business judgment rule" and an "entire fairness" test (A16), the Delaware Supreme Court condones inadequate representation and the failure to give notice, touchstones of due process protection in representative litigation. Given Delaware's preeminent position in American corporation law which allows the Delaware courts to adjudicate the rights of millions of absentee stockholders, the Opinion has practical significance across the country and necessitates the Court's review.

3. The Due Process Clause Protections Become Illusory Without Monitoring And, Accordingly, The Failure Of The Delaware Courts To Monitor A Representative Plaintiff Warrants Review.

The Court has recognized that a class action enables class members to recover for wrongdoing which would otherwise escape an accounting since the size of individual claims would preclude litigation. *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326, 338 (1980), *reh'g denied*, 446 U.S. 947 (1980). The person who comes forward as the representative plaintiff thus has power stemming from the class action itself far beyond his own individual interest. *Ibid.* Because of the concern that the self-proclaimed champion might abuse the fiduciary relationship he has undertaken, courts strictly monitor the actions of the representative plaintiff and hold him to a high standard of conduct lest for his own aggrandizement he should compromise the rights of the absentee class members in violation of the Due Process Clause of the Fourteenth Amendment. *Ibid*; and *see Young v. Higbee Co., supra*, 324 U.S. at 213. The monitoring responsibility should apply whether the representative plaintiff owns 25 shares or 700,000 shares.

The Trial Court in its final letter opinion did not monitor the representative plaintiff's conduct because it transformed the case to an individual action and then tested the representative plaintiff's conduct by what an individual plaintiff could do free of any fiduciary responsibility to class members.

The Delaware Supreme Court for its part also failed in its monitoring responsibility. It found no causal relationship where Valhi negotiated for itself and obtained a private settlement while serving as the class representative. It ignored the fact that the representative plaintiff agreed to abandon the claims of the absentee class members with prejudice while secretly negotiating a personal profit for itself. *Compare* A11 with A53-A55, paragraph 31. To meet the due process requirement of notice, the Delaware Supreme Court found that a PSA press release and a PSA information letter "constituted a complete dis-

closure to PSA stockholders," thus ignoring the critical facts that neither document referred to: (1) the representative plaintiff's personal profit; and (2) the representative plaintiff's commitment to cooperate to cause the dismissal with prejudice of the class action. *Compare* A11-A12 with A50-A52, paragraph 29. The Delaware Supreme Court claimed that the representative plaintiff's conduct did not leave the beneficiaries of the fiduciary relation "without recourse" when the record facts are that the representative plaintiff: (1) abandoned the class without notice to the class members of its agreement to abandon them or its personal profit, all in keeping with its commitment "to cooperate to accomplish to the extent possible the dismissal with prejudice of the Delaware action as to the purported plaintiff class on the Closing Date."; (2) opposed the intervention of a class member who learned by chance of the representative plaintiff's wrongdoing; and (3) objected to the striking of the Prior Orders and reinstatement of the original complaint. *Compare* A12 with A52-A53, paragraph 30. The Delaware Supreme Court viewed the failure to afford the protections of an adequate representative and notice as "procedural errors" capable of "rectification." *Compare* A13 with A38-A39 and A43-A45, paragraphs 7 and 17-19, respectively. The Delaware Supreme Court turned the monitoring responsibility topsy-turvy when it ruled that the intervening plaintiff had the burden to prove that the representative plaintiff's profit was "at the expense of, or to the prejudice of, PSA and its stockholders," thus removing from the representative plaintiff the traditional obligation of a fiduciary to account for his personal profit. *Compare* A14 with A39-A45, paragraphs 8-20. The Delaware Supreme Court found the "*ex post facto* hearing" the Trial Court held as the hearing "in response to Wied's application." A15. Not only did the Delaware Supreme Court ignore the fact of Mrs. Wied's objection of record (*compare* A15 with A47-A50, paragraph 28, especially A50, paragraph

28[9]), but, moreover, it disregarded the nature of the hearing which the remedial device of a constructive trust requires once the facts show the fiduciary has violated his trust. A court at a fairness hearing on a settlement of a representative action weighs the pros and cons of the terms of the settlement resolving the asserted claims and applies the court's business judgment as to whether or not those terms are fair, reasonable and adequate. *Rome v. Archer*, 197 A.2d 49 (Del. Supr. 1964). In contrast, when a court holds a constructive trust hearing, business judgment and entire fairness are not the benchmarks but, rather, the court's inquiry is simply whether or not the fiduciary has received anything of value while serving as trustee. Once the fiduciary has bargained for himself — and here the trustee even did so secretly — while serving as trustee of the rights of others, the "fairness" of his bargain is irrelevant. If he obtained a profit, the fiduciary may not keep it.[4] *Young v. Higbee Co, supra; Guth v. Loft, supra; Meinhard v. Salmon, supra*. The difference in the standards a court uses in the two situations is at the heart of monitoring.

The Due Process Clause requirements of notice and adequate representation surely require judicial monitoring which accords them more respect than a strained judicial effort to exculpate a representative plaintiff discovered *in flagrante delicto* by a small stockholder. It is vital that representative litigation go forward with the assurance that those who serve as representative plaintiffs do so with the certain knowledge that if they abandon their fiduciary relationship and seek to follow their own interests, courts will hold them accountable for any profit. If the state courts are to assume their role in determining the rights and duties of participants in corporate affairs (*Cort v. Ash*, 422 U.S. 66 [1975]), the state courts must rigorously discharge the monitoring responsibility. Without the Court's intervention, "monitoring" in Delaware in this case serves only to insulate fiduciary wrongdoing.

4. The instant situation is not one where, prior to any negotiations, a representative plaintiff on notice to the beneficiaries of his trust sought court approval to withdraw as the representative plaintiff in order to act for himself.

CONCLUSION

For the foregoing reasons, Mrs. Wied respectfully submits that the Court should grant the writ of certiorari.

Respectfully submitted,

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December 20, 1983

APPENDIX

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

No. 144, 1982

BARBARA J. WIED,
Intervenor—Plaintiff Below, Appellant,

v.

VALHI, INC.
Plaintiff, Below, Appellee,

Submitted: October 18, 1982
Decided: July 29, 1983

Before HERRMANN, *Chief Justice*,
HORSEY and MOORE, *Justices*.

Upon appeal from the Court of Chancery. Affirmed.

Irving Morris (argued) and Kevin Gross, of Morris and Rosenthal, P.A., Wilmington, and Melvyn I. Weiss, David J. Yardley and Keith F. Park, of Milberg Weiss Bershad & Specthrie, San Diego, California, Of Counsel, for appellant.

A. Gilchrist Sparks, III, of Morris, Nichols, Arsht & Tunnell, Wilmington, and Fred H. Bartlit, Jr. (argued), Jeffrey S. Davidson and Nancy E. Hollingsworth, of Kirkland & Ellis, Washington, D.C., Of Counsel, for appellee.

HERRMANN, *Chief Justice*:

This appeal arises from the refusal by the Court of Chancery to impose a constructive trust upon profits the intervenor-plaintiff alleges were received by the plaintiff in a private settlement of representative litigation.

I.

The plaintiff, Valhi, Inc. ("Valhi"), owned 700,000 shares, or in excess of 20% of the stock of PSA, Inc. ("PSA"). In October, 1978, in response to a perceived threat of a takeover by Valhi, PSA directors proposed certain amendments to PSA's charter and bylaws. Valhi opposed the amendments in a proxy contest. To implement that opposition, Valhi filed this action, under Chancery Court Rules 23 and 23.1*, against PSA on its own behalf and derivatively on behalf of PSA, as well as in the form of a class action on behalf of all stockholders of PSA similarly situated other than the defendant directors of PSA. The complaint sought injunctive relief against the adoption of the proposed charter and by-law amendments.

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* "RULE 23. CLASS ACTIONS

"*(a) Requisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

• • •

"*(e) Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs; except that if the dismissal is to be without prejudice to the class or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or

(Cont'd)

The complaint alleged that, prior to the filing of the action, Valhi had requested that the directors of PSA postpone the convening of the special meeting of the stockholders of PSA which had been scheduled to be held on November 20, 1978; that the PSA directors had refused to reconsider the proposed amendments or to postpone the November 20 stockholders' meeting; that the special meeting was being convened for the purpose of enacting anti-takeover provisions directed against Valhi. The complaint also charged that the PSA directors had devised a plan to enable them to retain their positions as directors and to assure a continuing veto power over proposed corporate acts; that the crux of the pro-

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(Continued)

indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made."

* * *

"RULE 23.1 DERIVATIVE ACTIONS BY SHAREHOLDERS.

"In a derivative action brought by 1 or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort. *The action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the Court directs; except that if the dismissal is to be without prejudice or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made.*" (Emphasis supplied)

posed amendments was to require a stockholder vote of 80% for the approval of virtually all transactions between PSA and any of its stockholders holding 20% or more of its stock unless the transaction had been previously approved by the directors. The complaint charged that the proposed amendments, to be considered at the special stockholder's meeting, included the elimination of the annual election of all members of the board of directors and the creation of a board divided into 3 classes to hold office for staggered terms of 3 years each, as well as the elimination of cumulative voting for the election of directors, the latter proposition being designed to prevent Valhi from electing its own candidate to the Board of PSA. The complaint alleged that the plan devised by the PSA directors, to be voted on at the November 20 meeting, was designed to use the corporate machinery of PSA and the Delaware Corporation Law for the improper purpose of perpetuating incumbent management in office.

The prayer of the complaint was for temporary and permanent injunctive relief against the adoption of the proposed charter and by-laws amendments as being unreasonable, invalid, and contrary to the provisions of the Delaware Corporation Law.

The complaint also included a stockholders' derivative action for reimbursement of corporate funds expended by PSA directors in the proxy contest.

As contrasted with the allegations thus made in the complaint, PSA's notice to its stockholders of the November 20 special meeting stated the purpose of the proposed amendments to be a proper discouragement of unilateral attempts by outsiders to gain control of PSA in a manner which might not be in the stockholders' best interests. And by the notice, the stockholders were urged to vote for the proposed amendments in their own interest in order to forestall the threatened takeover of PSA by Valhi.

Upon the basis of the foregoing, the Trial Court saw the issues at the outset of this case as follows:

> "Accordingly, the issues presented at the inception of this case were (1) whether or not PSA was justified in seeking to repel the overtures being made by Valhi by means of the adoption of so-called 'porcupine' provisions proposed to be voted on at the stockholder meeting scheduled for November 20, 1978, (2) whether or not PSA might properly seek to repel the overtures made by Valhi through the purchase of the shares held by Valhi in PSA, Kors v. Carey, 58 A.2d 136 (1960), and Cheff v. Mathes, Del. Supr. 199 A.2d 548 (1964), and (3) whether or not Valhi could properly sell its PSA stock to PSA."

The Trial Court denied the relief sought by the complaint. The stockholders' special meeting was duly held and the proposed amendments were approved. Shortly thereafter, PSA and Valhi entered into negotiations for the redemption of Valhi's PSA stock.

On January 10, 1979, Valhi moved to amend its complaint to remove the individual defendants from the suit, including the derivative claim against them for reimbursement of funds spent by the directors in the proxy contest. On February 1, 1979, the Trial Court granted the motion and Valhi filed its amended complaint. In this connection, there was no compliance with the notice-to-stockholder requirements of Rules 23 and 23.1.

On February 21, 1979, Valhi and PSA entered into an option agreement under which Valhi agreed to exchange all of its PSA stock for all of the stock of Jetair Leasing, Inc. ("Jetair"), a PSA subsidiary. Jetair's assets consisted of 4 ten-year-old Boeing aircraft. Under the redemption agreement, Valhi would lease the aircraft to PSA for 18 months for total rentals of $8,712,000. The agreement also provided:

". . . Valhi and PSA shall cooperate to accomplish to the extent possible the dismissal with prejudice of [the instant] action as to the purported plaintiff class on the closing date."

Valhi announced the February 21 agreement immediately in a press release, copies of which were mailed forthwith to all PSA stockholders with a transmittal letter advising the stockholders of the terms of the redemption agreement and stating that, if the transaction were consummated, Valhi would settle all of its litigation with PSA.

On February 22, 1979, Valhi informed the Trial Court of its February 21 agreement with PSA. Valhi did not advise the Court that the agreement contemplated the dismissal with prejudice of the class action. The Court suggested that Valhi amend its complaint to omit the representative claims since the Court had not yet certified the case as a class action. Valhi submitted an amended complaint deleting the class action claims without prejudice. The Court approved the amendment on April 16, 1979. Once again, however, there was no compliance with the requirements of the Rules for notice to PSA stockholders.

In July, 1979, Barbara J. Wied, a PSA stockholder, commenced a derivative action in the U. S. District Court for the Southern District of California ("the Federal action"), naming as defendants Valhi, the chairman of the board of Valhi, and all but one of the directors of PSA. Wied sought damages and injunctive relief in connection with the redemption agreement.

On August 3, 1979, PSA exercised its option to redeem Valhi's PSA stock under the terms of the February 21 agreement, the closing date to be October 31, 1979. Wied moved in the Federal action to enjoin consummation of the agreement. The Federal Court denied the motion.

On August 31, 1979, Wied moved to intervene as plaintiff in this case for the purpose of having the amended complaints stricken for non-compliance with the notice requirements of Rules 23 and 23.1. The Trial Court granted Wied's motion and reinstated the class and derivative claims upon the basis of that non-compliance. Wied undertook to prosecute the case under the original complaint filed herein, and her counsel were designated as lead counsel with primary responsibility for prosecution of the case.

In October, 1979, Valhi moved to withdraw as party plaintiff, seeking dismissal with prejudice of its individual claims. The Court deferred ruling on the motion; instead, it enjoined the scheduled closing of the redemption transaction on October 31, and directed the parties to proceed with notice to PSA shareholders under the Rules. However, the parties could not agree as to the form of notice.

On October 30, Valhi informed PSA that, because of the Court's action, the redemption agreement must be deemed terminated. PSA demanded, however, that Valhi perform under the agreement and cross-claimed in the Federal action against Valhi for specific performance of the agreement. Valhi renewed its motion to withdraw in the case at bar. The Trial Court again denied the motion pending required notice to PSA stockholders and opportunity for hearing. Again, the parties could not agree as to the form of notice, and the Trial Court announced it would prescribe guidelines after being advised as to the outcome of the Federal action.

On February 26, 1980, Valhi and PSA consummated an amended redemption agreement, containing substantially the same terms as the February 1979 agreement, but omitting the provision relating to the dismissal of this litigation with prejudice. On the same day, PSA declared a 25% stock dividend, redistributing to its stockholders almost all of the shares redeemed from Valhi.

Wied then began negotiations with PSA for the settlement of the reinstated class and derivative claims in this case. The parties reached a settlement with Court approval. Another PSA stockholders' vote was taken on the proposed charter and by-law amendments and they were again approved. Thus, apparently, the issues raised by the original complaint were settled by negotiation between Wied and PSA, with the Trial Court's approval. No monies were recovered in the settlement, but Wied obtained counsel fees.

Thereafter, Wied orally moved in this case for the imposition of sanctions upon Valhi for breach of its fiduciary duty, as representative of PSA stockholders, in consummating the agreement with PSA without the approval of the Trial Court and without the required notice to shareholders under Rule 23.1. The sanction sought was the imposition of a constructive trust upon Valhi's profits from the redemption.

In September 1980, the Trial Court ordered briefs on the appropriateness of such sanction in the absence of "any tangible recovery" by Wied for the shareholders in its settlement of the claims on their behalf against PSA directors.

The Trial Court ordered an "*ex post facto* hearing" to be held on the overall fairness of the price paid for Valhi's PSA shares under the redemption agreement. Notice was sent to stockholders outlining the history of the case, the positions of the parties, and the nature of the proposed hearing. The notice indicated that Wied would raise the issue of Valhi's breach of fiduciary duty and its duty to account for any profit it realized from the exchange of its PSA stock for the Jetair stock and the lease-back arrangement with PSA. The notice indicated Valhi's position to be that the redemption agreement was an arms-length transaction, with terms fair to PSA and its stockholders. Valhi also pointed to the stock dividend, consisting of the redeemed stock, as a benefit to PSA and its shareholders.

The fairness hearing was held in April 1981. Upon the basis thereof, in a February 1982 unreported opinion, the Trial Court denied Wied's application for sanctions against Valhi and the constructive trust sought. In so doing, the Trial Court concluded:

(1) That this action as brought by Valhi "is clearly not a strike suit" such as Rules 23 and 23.1 are aimed to forestall.

(2) That the "entire fairness" of the redemption transaction was established by the evidence at the hearing.

(3) That "while it is clear that a fiduciary may not make a profit at the expense of those for whom he sues, *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, and *Young v. Higbee Company*, 324 U.S. 204," Valhi made no profit "to which the other stockholders of PSA are entitled on a trust theory."

(4) That "[I]t is clear from the evidence adduced * * * that the directors of PSA exercised reasonable and fair judgment and demonstrated good faith in agreeing upon the price to be paid for the PSA stock held by Valhi, there having been arms' length bargaining and careful deliberation by the board of directors of PSA, coupled with such directors' reliance on independent consultants, prior to reaching a determination as to the propriety of the transaction in issue. Furthermore, at the April 14-16, 1981 hearing, the intervenor [Wied] stipulated to the exercise of good faith on the part of the directors of PSA, *Kaplan v. Goldsant*, Del. Ch., 380 A.2d 556 (1977). And such test of fairness is to be applied when the directors' motive in approving a purchase, such as the one in issue, is to remove a substantial stockholder deemed inimical to corporate policy, *Cheff v. Mathes*, supra. Here the intervenor stipulated that the directors of PSA carefully considered the proposed redemption of the PSA stock held by

Valhi, having exercised their business judgment on such proposal on four separate occasions, namely, February 1979, August 1979, October 1979, and February 1980. The intervenor has also conceded that during each one of these four periods of evaluation of the proposed redemption of its shares that the PSA directors and their consultants acted in good faith in reaching a determination that the transaction complained of was fair to the PSA stockholders. See also findings of fact and conclusions of law in related litigation between the intervenor and Valhi in the case of *Wied v. Shimp* * * * in the United District Court for the Southern District of California."

(5) That whether viewed as of the February 1980 closing date or as of a later date, the evidence adduced at the "fairness" hearing established that Valhi received no unfair profit in the consummation of the redemption agreement; that such evidence "established that the value of the PSA stock which Valhi surrendered to PSA in consummation of the redemption agreement was greater than the value of the Jetair Leasing stock which Valhi received from PSA under that agreement.

(6) That the evidence adduced at the "fairness" hearing "established that the terms governing the acquisition of * * * PSA stock from Valhi by PSA was entirely fair to such corporation and its stockholders."

Wied appeals.

II.

One of the two basic grounds of this appeal is Wied's contention that the Trial Court has permitted Valhi, a "faithless fiduciary," to "depart the litigation with the profit from a private settlement Valhi negotiated and entered into while serving as the representative plaintiff."

A.

The first keystone of the "faithless fiduciary" contention is the claim that Valhi violated a fiduciary duty by wilfully committing serious violations of Rules 23 and 23.1 in order to bargain for a private settlement.

Wied emphasizes correctly that those Rules were designed to protect against private settlements of representative litigation; that by Rule of Court and Delaware case law, a representative plaintiff is prohibited from "securing a personal profit and in the process abandoning the representative claims and other claimants." Wied argues, with feeling, that "to regard the notice provision required by Rules 23 and 23.1 as permitting a representative plaintiff to negotiate privately for a profit and retain it perverts the entire concept of notice and the conduct of representative litigation."

The difficulty with such "broad brush" approach in this case is that the general propositions relied upon are inapposite here. It is correct to say, of course, that Rules 23 and 23.1 are intended to guard against surreptitious buy-outs of representative plaintiffs, leaving other class members without recourse. See *Jaeger v. Muscat*, Del.Ch., 221 A.2d 607 (1966); *Chickering v. Giles*, Del.Ch., 270 A.2d 373 (1970). But such was not the situation or the result in this case.

Here there was no evidence of causal or other type of relationship between the asserted violation of the Rules and the proceeds of the stock redemption. Nor was there any secrecy about the redemption agreement itself. Although the amended complaints were inadvertently permitted by the Court without compliance with the notice requirements of the Rules, there was no effort by Valhi to conceal from fellow stockholders its redemption agreement with PSA. On the contrary, the press release and information letter of transmittal to PSA stockholders of February 21, 1979, made immediately upon the execution of the agreement, constituted a complete disclosure to PSA stockholders (including Wied) of

Valhi's action and intentions, as did the prompt notification to the Trial Judge by counsel on the very next day.

Nor were other PSA stockholders left without recourse. Rectifying any prejudice to PSA stockholders by the non-compliance with the Rules: Wied was permitted to intervene as party plaintiff, and her counsel designated as lead counsel; the amended complaint was stricken and the original complaint reinstated; the representative claims presented by the original complaint were litigated by Wied to a negotiated settlement with PSA; and, thereafter, in response to Wied's application, an *ex post facto* Rule 23 fairness hearing was held by the Court, upon proper notice, in which the facts and circumstances of the redemption agreement were fully explored by the Trial Court. And Valhi remained in the case throughout.

The determinative considerations in this facet of the action for the imposition of sanctions and a constructive trust are these: (1) the Trial Court permitted Valhi to amend the complaint in a manner which deleted originally asserted class and derivative allegations without any prejudice to their subsequent renewal; and (2) those same claims were in fact subsequently reinstated and then settled by Wied herself on a fair and reasonable basis. As found by the Trial Court, Valhi did nothing which prejudiced the claims of other PSA stockholders.

Noteworthy in this connection is this evidence that Valhi did not intend to prejudice PSA stockholders by the manner in which it litigated this action: In the Federal action, the Court found as fact that Valhi's purpose in amending its original complaint to delete the derivative claims was to expedite this litigation — not to settle it.

These factors distinguish this case from those on which Wied relies, wherein the basis of liability was the prejudice caused to representative claims by either dis-

missal of the actions with prejudice or releases. Wied relies mainly upon *Young v. Higbee Co.*, 324 U.S. 204 (1945) and its progeny. In those cases, representative plaintiffs engaged in conduct which prejudiced the representative claims asserted. For example, in Higbee, the representative plaintiff received six times the value of his stock in return for dismissing the appeal of a representative claim with prejudice. In *Clarke v. Greenberg*, N.Y.Ct.App., 71 N.E.2d 443 (1947), the representative plaintiff received $9,000 for stock valued at $51.88 and released the directors from the derivative claim. In *Dabney v. Levy*, S.D.N.Y., 92 F. Supp. 551, 553 (1950), *aff'd*, 2d Cir., 191 F.2d 201, *cert. denied*, 342 U.S. 887 (1951), the plaintiffs executed a release of the derivative cause of action and transferred plaintiffs' shares valued at $204.88 in return for $21,000.

Accordingly, we find no error in the Trial Court's rejection of the contention that Wied is entitled to the remedy sought because Valhi failed to comply with Rules 23 and 23.1. Likewise, we find no merit in the contention that the Trial Court, by its action or inaction in this case, sanctioned acts of "fiduciary faithlessness" in that connection. On the contrary, we find that the Trial Court acted with admirable speed and vigor in rectifying the non-compliance with its Rules.

* * *

We pause to note that the Trial Court stated that, while it found no concealment from or misrepresentation before the Court, the failure of counsel and the Court to follow Rules 23 and 23.1 "could not be condoned." We agree. We hold, however, that the procedural errors here were ultimately rectified by the Trial Court, the purpose of the Rules ultimately fulfilled, and justice ultimately done in this case. To hold otherwise would be to equate non-compliance with the Rules, ultimately and timely corrected by Court and parties, with a sanctionable breach of fiduciary duty. Neither the Rules nor justice require such punitive result in this case.

This is not to say, however, that non-compliance with Rules 23 and 23.1 should be easily excused. Nor do we intend to indicate that, under other facts and circumstances, sanctions against parties or lawyers, or fatal consequences to their case, may not result from lack of candor or non-compliance with the Rules here involved. We hold only that, in the instant case, timely corrective action by Court and counsel satisfied the requirements of justice.

B.

The second keystone of the "faithless fiduciary" contention, upon the basis of which Wied seeks the remedy of constructive trust, is the claim that Valhi departs the litigation with the profit of a private settlement. Wied relies upon an inapplicable standard of fiduciary accountability in contending that, regardless of whether PSA and its stockholders were prejudiced by the redemption, Valhi must be held accountable for any profit it derived therefrom.

The applicable rule here is not that a fiduciary may not profit, but that a fiduciary in Valhi's position may not profit at the expense of those for whom he sues. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-50 (1949). The question, therefore, is whether Valhi profited as a fiduciary at the expense of, or to the prejudice of, PSA and its stockholders. Indeed, that inquiry is mandated by the nature of the remedy which Wied seeks. As stated in *Adams v. Jankouskas*, Del.Supr., 452 A.2d 148, 152(1982):

> "[A constructive trust] is imposed when a defendant's fraudulent, unfair or unconscionable conduct causes him to be unjustly enriched at the expense of another to whom he owed some duty."

Wied cites no applicable authority to the contrary.

The Trial Court's findings and conclusions as to the profit issue in this case are supported by the applicable

rule of law and by the record. It cannot be said that the findings are clearly wrong and that the doing of justice requires their overturn. Accordingly, the Trial Court's findings in this regard will not be disturbed. *Levitt v. Bouvier*, Del.Supr., 287 A.2d 671 (1972).

C.

The last keystone of Wied's "faithless fiduciary" contention is the claim that "Valhi's actions cannot be cured by an invention called an *ex post facto* fairness hearing."

We dismiss this claim with the statement that the record shows that the "fairness hearing" was ordered by the Court in direct response to Wied's "last resort" contention that in the redemption Valhi received an exorbitant price for its stock. Wied cooperated, without objection, in the arranging and conduct of the hearing. Dissatisfaction now with the result of the hearing is not sufficient ground for an apparently complete shift of position as to its propriety.

III.

The other basic ground of this appeal is Wied's contention that the "facts presented at the *ex post facto* hearing prove that Valhi's illegally obtained profit was $23,144,506."

This ground is based upon the contention, dealt with above, that any profit realized by Valhi is an unfair profit to which the stockholders of PSA are entitled. As we have held, the only profit properly at issue in this case is a profit which has been gained at the expense of the stockholders of PSA. Having concurred with the Trial Court in its conclusion that Valhi realized no profit in that category, we find no useful purpose in further pursuing the question of the amount of profit Valhi may have realized out of the redemption.

IV.

Valhi contends that the Trial Court properly rejected Wied's application for a constructive trust on the basis of the finding that the transaction was entirely fair to PSA and its stockholders — a finding grounded upon the evidence and the application of the business judgment rule.

It appears to us that, except for relevancy, Wied has declined to join issue on the merits of that question or the evidence and rule of law applied thereto by the Trial Court. Underlying all arguments made by Wied in this connection is the renunciation, or at least the denunciation, of the *ex post facto* fairness hearing as a relevant proceeding, and an insistence throughout, as a basic premise, that any profit realized by Valhi *per se* rendered the entire transaction unfair.

Having ruled that position untenable under the facts and circumstances of this case, we find nothing now before us for decision as to the entire fairness of the transaction.

* * *

There is no reversible error upon any ground of this appeal.

AFFIRMED.

A 17

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE

February 26, 1982

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Re: *Valhi and Wied v. PSA, C.A. 5730, Submitted: November 11, 1981*

On October 30, 1978, Valhi filed this action against PSA, Inc. on its own behalf and derivatively on behalf of PSA as well as in the form of a class action pursuant to the provisions of Rule 23 on behalf of all stockholders of PSA similarly situated other than the individual defendant directors of PSA. The complaint sought injunctive relief against the adoption of proposed amendments to PSA's charter and by-laws designed to impede what was believed to be the threat of a takeover of PSA, by Valhi, which at the time held 700,000 shares or in excess of 20% of the stock of PSA.

The complaint alleged that Valhi would fairly and adequately protect the interests of the class, that the prosecution of separate actions by the individual members of the class would create a risk of inconsistent and varying adjudications and that a class action is superior to other available methods for bringing about the fair

and efficient adjudication of a controversy such as the one in issue.

Prior to the commencement of this action the plaintiff Valhi had requested that the directors of PSA postpone the convening of a special meeting of stockholders of the corporation which had been scheduled for November 20, 1978, and that such board reconsider the matters complained of, but, as alleged in the complaint, such request had been ignored. The stockholders' meeting in question was to be convened, as noted above, for the purpose of enacting proposed anti-takeover provisions directed against Valhi.

The complaint also charged that the directors of PSA had devised a plan to be presented to its stockholders designed to assist such directors improperly to retain their positions on the board of directors of PSA and to assure a continuing veto power over proposed corporate acts, the heart of the proposed changes sought to be achieved by the directors of PSA being the adoption of a requirement for a vote of 80% of its stockholders for the approval of virtually all transactions between PSA and any of its stockholders holding 20% or more of its stock unless the transaction in question has been, inter alia, approved by the directors of PSA.

Also proposed to be considered at such November 20, 1978 meeting of the stockholders of PSA was the elimination of the annual election of all members of the board of directors and the creation of a board divided into three classes of directors to hold office for staggered terms of three years each as well as the elimination of cumulative voting for the election of directors, the latter proposition being apparently designed to prevent Valhi from electing its own candidate to the board of PSA.

The complaint went on to contend that the proposed scheme devised by the defendant directors of PSA, which was to be voted on at such November 20, 1978 meeting of stockholders, was designed to use the corporate machinery of PSA as well as the Delaware corporation law for the improper purpose of perpetuating in-

cumbent management in office. The complaint concluded by asking for the granting of temporary and permanent injunctive relief against the adoption of the proposed by-law amendments as well as the proposed amendments to PSA's certificate of incorporation as unreasonable and invalid, being allegedly contrary to the purpose behind the applicable provisions of the Delaware corporation law and the public policy of the State of Delaware.

On the other hand, in the notice to its stockholders of October 23, 1978, fixing the meeting date of November 20, 1978, PSA had reported that the proposed amendments were properly designed to discourage unilateral attempts by outsiders to gain control of PSA in a manner which might not be in its stockholders' best interests, and such stockholders were urged, in their own self-interest, to vote for the suggested changes in the corporate charter of PSA as well as in its by-laws in order to forestall the threatened takeover of the corporation by Valhi.

Accordingly, the issues presented at the inception of this case were (1) whether or not PSA was justified in seeking to repel the overtures being made by Valhi by means of the adoption of so-called "porcupine" provisions proposed to be voted on at the stockholder meeting scheduled for November 20, 1978, (2) whether or not PSA might properly seek to repel the overtures made by Valhi through the purchase of the shares held by Valhi in PSA, Kors v. Carey, 58 A.2d 136 (1960), and Cheff v. Mathes, Del. Supr. 199 A.2d 548 (1964), and (3) whether or not Valhi could properly sell its PSA stock to PSA.

And while the complaint, insofar as it was directed against the so-called "porcupine" provisions, has been settled by negotiations between the intervenor Mrs. Wied and PSA, the issue remaining to be resolved is whether or not the intervenor Mrs. Wied is entitled to the entry of an order establishing a constructive trust for the benefit of the stockholders of PSA to be imposed on

Valhi's alleged profits resulting from the redemption of its PSA stock. At this juncture it is indeed ironic that this long-pending case would have undoubtedly been proven to be unnecessary had Valhi and PSA proceeded directly into negotiations for the purchase and sale of the 700,000 PSA shares owned by Valhi without the resort to litigation.

First of all, I am not persuaded that the plaintiff Valhi and its attorneys can be charged with bringing a strike suit, a type of action in which a plaintiff, according to Mrs. Wied's expert, is usually a small stockholder, which Valhi was clearly not, in an action involving large sums of money. Such expert testified at the April 14-16th, 1981 hearing that the principal beneficiaries in such cases, brought before the adoption of Rules 23 and 23.1, were very often the lawyers for plaintiffs who stood to receive substantial fees in surrepticious settlements of such cases, a temptation to dispose of a case on the basis of counsel fees having been very great. However, counsel for Valhi have received no Court approved counsel fees as a result of the consummation of the redemption agreeement, and this case, as noted above, is clearly not a strike suit.

The Court having heard and evaluated the evidence on the basic fairness of the price paid for Valhi's stock held in PSA at the April 14-16th, 1981 ex post facto hearing, which was held in conformity with the Court's letter opinion of September 22, 1980, I am persuaded that the entire fairness of such transaction was established at such hearing and that Mrs. Wied's objections to such transaction in her application for the imposition of a constructive trust on the proceeds of the redemption of Valhi's PSA stock must be denied.

I say this because while it is clear that a fiduciary may not make a profit at the expense of those for whom he sues, Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, and Young v. Higbee Company, 324 U.S. 204 (1945), I am not persuaded that Valhi made

any profit to which the other stockholders of PSA are entitled on a trust theory.

PSA purchased 700,000 shares of its own stock from Valhi on February 26, 1980 at a time when the value of such stock totalled about 19.7 million dollars. However, PSA made such purchase at a cost to it of only 12.6 to 16.7 million dollars. Thus, PSA realized an immediate gain on such transaction of 5.6 million dollars, having thus acquired a 21% interest in its own company for a consideration representing 9.5% of its assets.

In addition, as a result of such transaction, Valhi acquired the stock of a PSA subsidiary, namely Jetair Leasing, the sole asset of which were four eleven year old Boeing 727 aircraft, and by turning over Jetair stock to Valhi instead of the aircraft themselves, PSA structured the transaction in a manner which avoided a federal depreciation recapture tax of up to 12 million dollars. PSA also arranged for the lease of such Jetair aircraft from Valhi for the period through April 1981, thus insuring PSA's use of four needed aircraft until the planned delivery of new replacements, at which time the old aircraft, which were depreciating in value, were to be disposed of.

In addition, the stockholders of PSA were benefited directly as a result of the stock dividend made possible by the acquisition of such shares by PSA. Furthermore, at the time of the April 14-16th, 1981 fairness hearing the market price of such stock had risen to more than 26 million dollars. Later that summer, the Jetair Leasing stock, which Valhi had received in carrying out the redemption agreement, was contracted for sale at a price of at most 21.89 million dollars. In short, I am satisfied that the value of PSA stock which Valhi surrendered to PSA as a result of the so-called redemption agreement exceeded the value of the Jetair Leasing stock which Valhi received in the transaction.

And while the conduct of then opposing counsel as well as that of the Court cannot be condoned, in the for-

mer seeking and the latter granting approval to the filing of an amended complaint which removed the derivative and class action allegations from the original complaint without notice to the stockholders of PSA and without a hearing. I am satisfied that it was established at the April 14-16th, 1981 ex post facto hearing that the sale of its PSA stock by Valhi to PSA was entirely fair to PSA and its stockholders. In other words, it is clear from the evidence adduced at such hearing that the directors of PSA exercised reasonable and fair judgment and demonstrated good faith in agreeing upon the price to be paid for the PSA stock held by Valhi, there having been arms' length bargaining and careful deliberation by the board of directors of PSA, coupled with such directors' reliance on independent consultants, prior to reaching a determination as to the propriety of the transaction in issue. Furthermore, at the April 14-16th, 1981 hearing the intervenor stipulated to the exercise of good faith on the part of the directors of PSA, Kaplan v. Goldsant, Del. Ch. 380 A.2d 556 (1977). And such test of fairness is to be applied when the director's motive in approving a purchase, such as the one in issue, is to remove a substantial stockholder deemed inimical to corporate policy, Cheff v. Mathes, supra. Here, the intervenor has stipulated that the directors of PSA carefully considered the propsed redemption of the PSA stock held by Valhi, having exercised their business judgment on such proposal on four separate occasions, namely, February 1979, August 1979, October 1979, and February 1980. The intervenor has also conceded that during each one of these four periods of evaluation of the proposed redemption of its shares that the PSA directors and their consultants acted in good faith in reaching a determination that the transaction complained of was fair to the PSA shareholders. See also findings of fact and conclusions of law in related litigation between the intervenor and Valhi in the case of Wied v. Shimp, et al, Civil No. 78-

913-GT in the United States District Court for the Southern District of California.

In addition, the evidence adduced at the April 14-16th, 1981 hearing, in my opinion, establishes that Valhi received no unfair profit in the consummation of the redemption agreement here in issue. Thus, on February 28, 1980, in conformity with the redemption agreement, Valhi received the stock of Jetair Leasing, the sole assets of which were four eleven year old Boeing 727-200 aircraft. On June 11, 1981, Valhi's parent corporation agreed to sell its Jetair stock to Eastern Airlines at what proved to be a market value of said Jetair aircraft of $5,472,500 per plane, which price conforms with the opinion of Mr. Jordan A. Green, Valhi's expert, who believed that the market value per each Boeing plane in issue was approximately $5.5 million. I am satisfied on the basis of the testimony adduced at such hearing that whether one values the transaction as of the February 26, 1980 closing date or as of a later date, that Valhi realized no unfair profit in the redemption of its PSA stock. In short, I am persuaded that the evidence adduced at the April 14-16th, 1981 hearing established that the value of the PSA stock which Valhi surrendered to PSA in the consummation of the redemption agreement was greater than the value of the Jetair Leasing stock which Valhi received from PSA.

I am also satisfied that the April 14-16th, 1981 hearing, ordered by the Court, established that the terms governing the acquisition of 700,000 shares of PSA stock from Valhi by PSA was entirely fair to such corporation and its stockholders. I therefore conclude that there is no basis for the imposition of a constructive trust on the consideration received by Valhi on the sale of its PSA stock. Accordingly, Valhi's application for the imposition of a constructive trust on such consideration will be denied.

On notice an appropriate form of order may be submitted.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
CHANCELLOR

COURT HOUSE
WILMINGTON, DELAWARE

September 22, 1980

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Re: *Valhi, Inc. v. PSA, Inc., C.A. 5730, Submitted: June 4, 1980*

Because, on February 22, 1979, this Court unwisely condoned a course of action proposed by then opposing counsel by giving approval to the filing of an amended complaint in this litigation which removed the class action allegations from the original complaint, events were thereafter caused to transpire which ultimately resulted in the purchase by the defendant corporation of a substantial block of its own shares from Valhi and the removal of Valhi as a representative plaintiff suing in the alleged interest of other stockholders of its class without the prior approval of the Court. See Rules 23 and 23.1.

The intervener Wied now seeks to have the Court apply what she terms sanctions against the original plaintiff Valhi for the injury allegedly sustained by the stockholders of PSA other than Valhi, attributable to what Mrs. Wied claims to have been Valhi's breach of its

fiduciary duty to such other stockholders of PSA for whose benefit it ostensibly brought this class action on October 30, 1978, by the sale of its PSA shares to such corporation for an allegedly excessive price. Compare Young v. Higbee Co., 324 U.S. 204 (1945).

Because the sale of its PSA stock by Valhi to the issuing corporation did not have the prior approval of this Court but nonetheless resulted in a dismissal or compromise of Valhi's original action, I am persuaded that Valhi must be required to establish the overall fairness of the terms of such sale at a hearing, notice of which must be given to other members of the class for whose benefit this action was originally brought.

Granted that as a result of the intervention of Mrs. Wied in this litigation, several basic purposes of the rules governing class actions have been served notwithstanding the dismissal of the original plaintiff Valhi, and recognizing that the basic relief sought in the original complaint has since been at least partially achieved in a Court-approved negotiated settlement in which the intervening plaintiff Wied actively participated, nonetheless there remains for ex post facto consideration the basic fairness of the price paid for Valhi's PSA stock as a result of consummation of the so-called redemption agreement.

The resolution of this question will require a hearing on notice at which the proponents and opponents of the fairness of the contract price paid for Valhi's PSA shares will have full opportunity to express their opinions subject to cross examination.

After intervenor has moved in writing for the scheduling of such a hearing and Valhi has responded thereto in writing, an order setting down such motion for a hearing may be submitted.

A 26

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
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March 6, 1980

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Re: *Valhi, Inc. v. PSA, Inc., C.A. 5730, Submitted: February 29, 1980*

Valhi, until recently the holder of 700,000 shares of common stock of PSA, on February 26, 1980, entered into an agreement of amendment to a redemption agreement attached to a call option agreement of February 21, 1979, which had been entered into between it and PSA on the date indicated. Such agreement of amendment purported to dispose of litigation pending between such corporations by providing for the closing of the sale of Valhi's 700,000 shares of PSA stock to the latter on the date above stated.

At the time such amendment to the redemption agreement was entered into and the closing consummated there was pending in this Court an application of the intervenor Wied to have this Court require notice to be given to all stockholders of PSA other than Valhi, its directors and the directors of PSA of what the intervenor Wied claimed to be a settlement or compromise of a derivative action as allegedly required by Rule 23.1 as a

prerequisite to a hearing on the propriety of such alleged compromise or dismissal.

At the time of such closing, no injunctive order against the consummation of the agreement for the sale of Valhi's PSA stock to PSA was outstanding so that the sale complained of by the intervenor Wied is now a fait accompli. This being the case, through her attorney, Mrs. Wied now asks for the application of sanctions against Valhi for carrying through with the questioned sale while it was under attack in this Court.

In resisting the imposition of sanctions and in effect seeking ex post facto approval of its withdrawal as a representative plaintiff, Valhi points to the fact that the intervenor Wied professes to be ready and willing to represent the interests of the stockholders of PSA other than the individual defendants and that the rights of such stockholders in this derivative litigation will therefore be adequately protected, and, as reported to the Court by counsel for Valhi, such claims are close to settlement in the California litigation. Valhi accordingly contends that a basic purpose behind the enactment of Rule 23.1 has been served, namely that of insuring that a derivative action not be compromised or dismissed in a manner which will militate against the interests of the class of stockholders for the benefit of whom the action was filed has been served.

I am satisfied, however, that Valhi over-simplifies the reason for the enactment of Rule 23.1, another basic purpose behind the promulgation of which having been, I believe, the elimination of the evils inherent in a so-called "strike suit" which was once permitted to be filed in the guise of an action for the alleged benefit of a corporation, the actual purpose of such a suit being to entice corporate management into an agreement to buy out a "striking" stockholder at a premium, thus achieving the principal purpose for which the action was filed.

Valhi, as noted above, persists in its effort to have its alleged personal rights held by it in its status as a

stockholder of PSA isolated from its duties as a fiduciary suing as a representative of the stockholders of PSA, other than the individual defendants, arguing that recognition of such a separation of interests will not subvert a basic purpose behind the enactment of Rule 23.1. Thus, while counsel for Valhi in their memorandum of January 29, 1980 recognize that "***Valhi, as a representative plaintiff has a duty — fiduciary if you will — not to compromise or settle those (class and derivative) claims for its own personal benefit***" contend that: "Beyond this duty, however, noting in Rules 23 and 23.1 limits Valhi's right to deal with its own property, including its stock of PSA, as it sees fit."

Rule 23.1 was adopted as had Rule 23, first by the federal courts and then by state courts, for the overall purpose of insuring judicial supervision over derivative actions, thereby preventing abuses in the disposal of such litigation, such as the buying off of a derivative claim, Chickering v. Giles, Del. Ch., 270 A.2d 373 (1970), such rule being directed against "***private settlements under which the plaintiff stockholder and his attorney get the sum paid in settlement and the corporation gets nothing.", Craftsman Finance and Mfg. Co. v. Brown (S.D.N.Y. 1945) 64 Fed. Supp. 168. And the most efficacious way to prevent such abuses was determined to be to make any compromise or dismissal subject to court approval after giving other stockholders notice of the terms of such a proposal, thus providing such other stockholders with an opportunity not only to register objection to any proposed buying off of a plaintiff or to protest any other alleged unfairness in a proposed compromise or settlement, but also to provide, in the absence of any showing of a buying off or the like, an opportunity for any other stockholder to intervene and take up the prosecution of a derivative action which the original plaintiff seeks to abandon.

Logically, when a dismissal of a derivative action is sought without prejudice or with prejudice as to the

plaintiff only, thus insuring the continuity of the litigation, notice to stockholders is not required provided "*** there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made."

Here, while there appears to have been a buying out of Valhi's claim, which was brought derivatively, no contribution to the claimed settlement has been made by the alleged wrongdoers, namely the directors of PSA, as was the case in Clark v. Greenberg, N.Y. Ct. of App., 71 N.E.2d 443 (1947), but rather such alleged buying out of Valhi's PSA stock appears to have been accomplished by the board of directors of PSA through the use of corporate assets either for the improper purpose of preventing a threat to entrenched management or perhaps the proper purpose of ensuring the future well being of PSA. Compare Kors v. Carey, Del. Ch., 158 A.2d 136 (1960), Bennett v. Propp, Del. Supr., 187 A.2d (1962), and Cheff V. Mathes, Del. Supr., 199 A.2d 548 (1969).

Under the circumstances here presented, however, there would appear to be no purpose served by the giving of notice to stockholders, there being no settlement fund in hand received from the directors of PSA. I have decided that before reaching a decision on the pending application for the imposition of sanctions against Valhi, I should have briefs from opposing counsel on the questions of whether or not under the present circumstances such form of relief against Valhi is appropriate, no tangible recovery having been made from the alleged wrongdoers, namely, the directors of PSA, and, if so, the nature of such sanctions. A proposed brief schedule may be submitted for the Court's approval.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
CHANCELLOR

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WILMINGTON, DELAWARE

October 30, 1979

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Irving Morris, Esquire
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Re: *Valhi v. PSA, C.A. 5730, Submitted: October 29, 1973*

Exactly a year ago Valhi filed its complaint in this action in which it asked this Court to strike down certain anti-takeover provisions proposed to be adopted by the management of PSA. Such complaint alleged in part:

> "2(a) Valhi brings this action derivatively on behalf of PSA, on its own behalf, and as a class action pursuant to Rule 23 of the Rules of the Court of Chancery on behalf of all stockholders of PSA similarly situated, excluding the defendants herein.
>
> "(b) The class is so numerous that joinder of all members is impracticable.
>
> "(c) There are questions of law or fact common to the class and the claims of Valhi are typical of the claims of the class.
>
> "(d) Valhi will fairly and adequately protect the interests of the class.
>
> "(e) The prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications.

"(f) A class action is superior to other available methods for the fair and efficient adjudication of this controversy."

Having considered the original complaint and what I deem to be relevant facts now before the Court as well as having heard argument of counsel on the motion of Valhi for leave to withdraw as a party plaintiff in this action and concluded that the action proposed by Valhi must be viewed in the light of the fact that Valhi brought this action in a fiduciary capacity for the benefit of all of the stockholders of PSA other than the individual defendants, I conclude, in the exercise of my discretion, that action on such motion to withdraw must be deferred until Court-approved notice of such application is given to the stockholders of PSA and a time fixed for the Court to hear objections or suggestions of such stockholders as to the pending motion of Valhi, Rules 23, 23.1 and 21.

Following such hearing, the Court will determine whether or not Valhi's motion for leave to withdraw as a plaintiff should be granted, and if so, on what terms and conditions, such as the possible right of the stockholders of PSA, other than the individual defendants, to share in the proposed settlement on which Valhi relies, on a trust theory. I also conclude that the fact that class action certification did not precede Valhi's application does not mean that said application is free of the requirements of Rules 23 and 23.1. See Yaffe v. Detroit Steel Corporation, D. Ct., N.D. Ill., 50 F.R.D. 481 (1970), Rothman v. Gould, D. Ct., S.D.N.Y., 52 F.R.D. 499 (1971), and McArthur v. Southern Airways, C.A. 5, 566 F.2d 298 (1977). Compare Shelton v. Fargo, C.A. 4 F.2d 1298, Raynor v. LTV, Del. Ch., 517 A.2d 43 (1974), and Lutz v. Garber, Del. Ch., 357 A.2d 746 (1976).

On notice, an order in conformity with the above may be submitted.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
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WILMINGTON, DELAWARE

October 22, 1979

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Re: *Valhi, Inc. v. PSA, Inc., C.A. 5730, Submitted: October 22, 1979*

First of all, I am satisfied that in an action of this type, as originally brought, the disposition of such a case is no longer controlled by the rule of Keller v. Wilson, Del. Ch. 194 A.45 (1937), which permitted a class action to be dismissed by the original plaintiff without notice to the other stockholders on the theory that the original plaintiff had the burden of carrying the costs of the action, and therefore could control its disposition. Such actions are now controlled by either Rule 23 or Rule 23.1.

Secondly, the inability or inadequacy of representation in a case such as this is not limited to the caliber of the attorney whom an existing plaintiff has retained, but also includes the position and knowledge of the existing party vis a vis the applicant for intervention. Young v. Janas, Del. Ch. 136 A.2d 189 (1954) and Schiff v. RKO Pictures, Del. Ch. 136 A.2d 193 (1954).

In my opinion, the motion of Mrs. Wied to intervene in this action must be granted in light of the provisions of our class action and derivative action rules. As part of such intervention, an order may be presented permitting Mrs. Wied's intervention as a plaintiff and rescinding this Court's orders of February 1, 1979, as well as of April 16, 1979.

Mandate

THE SUPREME COURT OF THE STATE OF DELAWARE

To The Honorable The Judges of The Court of Chancery of the State of Delaware in and for New Castle County:

Greeting:

WHEREAS, before you or some of you in a cause entitled as follows:

VALHI, INC.

v. C.A. No. 5730

BARBARA J. WIED

a certain judgment or order was entered on the 16th day of April 1982, to which reference is made; and

WHEREAS, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on July 29, 1983, a certified copy of which is attached hereto;

ON CONSIDERATION WHEREOF IT IS ORDERED AND ADJUDGED that the said judgment or order be and it is hereby affirmed.

WITNESS the Honorable D. L. Herrmann our Chief Justice, at Dover, the First day of January, A.D. 1983.

Issued September 28, 1983
Supreme Court No. 144, 1982

/s/ LOREN C. MEYERS
Clerk of the Supreme Court

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

No. 144, 1982

BARBARA J. WIED,
Intervenor—Plaintiff Below, Appellant,

v.

VALHI, INC.
Plaintiff Below, Appellee,

Submitted: September 16, 1983
Decided: September 28, 1983

Before HERRMANN, *Chief Justice*, MCNEILLY, HORSEY, MOORE and CHRISTIE, *Justices*.

ORDER

This 28th day of September, 1983,

Upon due consideration of the Motion for Reargument under Rule 18 and Motion for Rehearing *en Banc* under Rule 4(f), filed herein on behalf of the Appellant.

IT IS ORDERED That the said Motions be and they are hereby DENIED.

BY THE COURT:

/s/ D. L. HERRMANN
Chief Justice

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

No. 144, 1982

BARBARA J. WIED,
Intervenor-Plaintiff Below,
Appellant

v.

VALHI, INC.,
Plaintiff Below, Appellee

MOTION FOR REARGUMENT PURSUANT TO RULE 18 AND MOTION FOR REHEARING EN BANC PURSUANT TO RULE 4

Barbara J. Wied, Intervenor-Plaintiff Below-Appellant ("Mrs. Wied"), by her attorneys, Irving Morris and Kevin Gross, respectfully moves pursuant to Rules 18 and 4 of the Supreme Court Rules for reargument and rehearing before the Court en Banc, respectively, of the rulings by the Court in the Opinion, dated July 29, 1983 (cited as "the Opinion" or "Slip Op."). In support of her Motion, Mrs. Wied by her attorneys respectfully represents:

1. The Court should grant the Motion for the following reasons:

> First: By its Opinion, the Court has raised a due process issue under the Fourteenth Amendment to the United States Constitution by placing its judicial *imprimatur* upon the conduct of a representative plaintiff where class members did not receive any notice of the representative's commitment to cooperate to dismiss with prejudice the class claims

at the very time the representative negotiated and entered into a settlement providing for a private benefit to it and to it alone. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-174 (1974). The failure to give notice violates the "requirements of due process to which the class action procedure is of course subject." *Idem*, quoting with approval the Advisory Committee's Note to Rule 23, 28 U.S.C. App., at p. 7768. *See* Section I, paragraphs 2-7, below.

Second: Although the Opinion addresses the conduct of a representative plaintiff who has entered into "the fiduciary relation," in the words of the Court in its landmark decision in *Guth v. Loft, Inc.*, Del.Supr., 5 A.2d 503 (1939), the Court in the Opinion adopts a standard of fiduciary conduct at odds with *Guth v. Loft* without acknowledging *Guth v. Loft* and its progeny and their applicable teaching. Reconsideration by the panel or rehearing by the Court en Banc "is necessary to secure or maintain uniformity in Supreme Court decisions." *See* Rule 4(f)(ii). *See* Section II, paragraphs 8-20, below.

Third: The proceeding involves questions of exceptional importance. *See* Rule 4(f)(i). The Opinion is the first time in its history where the Court addresses (1) the responsibilities a representative plaintiff assumes when he volunteers to champion the interests of others and enters into "the fiduciary relation" and (2) the standards of conduct the representative plaintiff must observe once he comes forward. *See* Section III, paragraphs 21-27, below.

Fourth: The Opinion contains serious factual errors which should not stand given the record. *See* Section IV, paragraphs 28-32, below.

I

2. The constitutional issue arises from the fact that when Valhi, Inc. ("Valhi") came forward as a representa-

tive plaintiff it volunteered to assert a cause of action not merely on behalf of itself but, as well, on behalf of all the other members of the class on behalf of whom it sued. Thus, Valhi as the representative held in a fiduciary capacity all the claims of all the class members which in their totality constituted the corpus of the trust. Valhi, while serving as the representative plaintiff, entered into negotiations and, finally, effected an agreement in which Valhi bargained away the corpus of the trust. Valhi expressly agreed with PSA to "cooperate to accomplish to the extent possible the dismissal with prejudice of the Delaware action as to the purported plaintiff class on the Closing Date." A89. In the same agreement in which Valhi abandoned the rights of the class members in the corpus of the trust, Valhi secured substantial benefits for itself alone among all the persons who had asserted the claims through Valhi in the representative action. Valhi took the unilateral action it did without any notice to the beneficiaries of the trust that it had committed to abandon the interests of the members of the class in the corpus of the trust with prejudice to them. The Trial Court did not find that notice was given to the class members. A361-A368. The Court, however, finds that a PSA February 21, 1979 Press Release and information letter "constituted a complete disclosure to PSA stockholders" (Slip Op., page 14) despite the fact that neither document disclosed Valhi's secret agreement and its profit.

3. In *Eisen, supra,* at 173-174, the United States Supreme Court addressed the subject matter of notice under Rule 23 and its place in the penumbra of constitutional rights. The Supreme Court concluded that due process requires that a representative plaintiff give notice to those for whom he sues so that they may know of the pendency of the representative litigation, how the representative's litigation is affecting their rights (by way of settlement or otherwise) and what they must do

to protect their rights. The importance of giving notice as a matter of due process is so significant that the Supreme Court has held that a stockholder who cannot defray the costs of giving notice may not be relieved of the burden to do so even if it means that the meritorious litigation he has brought cannot continue. *See Eisen v. Carlisle, supra.*

4. The record is crystal clear that Valhi gave no notice whatsoever to the members of the class of the fact that it had committed to cooperate to dismiss with prejudice the class claims as part and parcel of its agreement whereby it secured a private benefit from the settlement it reached with PSA in February, 1979. The fact is what Valhi did in secret in the conference room with PSA, Valhi deliberately did not share with the Trial Court in the courtroom let alone with the members of the class.

5. Accordingly, as of February 21, 1979, having deliberately abandoned the rights of all other class members in the trust corpus, Valhi must account as of that time for whatever profit it achieved by the settlement agreement which violated the due process rights of the members of the class.

6. The odd result of the Opinion is that despite the due process violation resulting from the failure to give any notice, the Opinion places upon Mrs. Wied as the intervening plaintiff the burden to prove that Valhi's profit was "at the expense of, or to the prejudice of, PSA and its stockholders." Slip Op., pages 17-18. Given Valhi's violation of due process, the Court should place upon Valhi the burden of showing that it did not profit from the settlement, a burden Valhi cannot meet.

7. If representative plaintiffs are free to disregard the due process requirements which they must observe and if courts regard the failure to observe the due process requirements as "procedural errors" capable of "rectification" (Slip Op., page 16), representative litigation ceases to have its intended therapeutic benefit and becomes the vehicle for personal profiteering by represen-

tative plaintiffs who would abandon "the fiduciary relation" for private gain as Valhi has done here. The motive of the fiduciary representative plaintiff is irrelevant — the harm is done.

II

8. Although the Court accepts, as, indeed, the Court should, that a representative plaintiff holds a fiduciary relationship to those on behalf of whom he sues (Slip Op., *passim*), the Opinion does not consider "the fiduciary relation" of a representative plaintiff and match the conduct expected of him against the standards the Court established in *Guth v. Loft* years ago for those holding "the fiduciary relation" and which the Court has consistently followed. *Compare* the Opinion with *Guth v. Loft*, *supra*; and *see* the frequently cited decision of Chancellor Harrington in *Brophy v. Cities Service Co.*, Del.Ch., 70 A.2d 5 (1949), cited only recently with approval by the Court in *Adams v. Jankouskas*, Del.Supr., 452 A.2d 148, 152 (1982). The Court even more recently (i.e., on February 1, 1983) in *Weinberger v. UOP, Inc.*, Del.Supr., 457 A.2d 701 (1983), renewed its approval of both *Guth v. Loft* and *Brophy*. *See Weinberger v. UOP*, *supra*, at pages 710, 711.

9. The Court's holding upon which it rested its rejection of Mrs. Wied's arguments (Slip Op., Section II, pages 12-19, and Section III, page 19) and its acceptance of Valhi's contention (Slip Op., Section IV, pages 19-20) is that Mrs. Wied is in error when she claims that Valhi must be held accountable for *any* profit it derived from the settlement which Valhi made while it served as a representative plaintiff. Slip Op., pages 17-20. The Court holds (Slip Op., pages 17-18):

> The applicable rule here is not that a fiduciary may not profit, but that a fiduciary in Valhi's position may not profit at the expense of those for whom he sues. *Cohen v. Beneficial Indus. Loan Corp.*, 337

U.S. 541, 549-50 (1949). The question, therefore, is whether Valhi profited as a fiduciary at the expense of, or to the prejudice of, PSA and its stockholders. Indeed, that inquiry is mandated by the nature of the remedy which Wied seeks. As stated in *Adams v. Jankouskas*, Del.Supr., 452 A.2d 148, 152 (1982):

> "[A constructive trust] is imposed when a defendant's fraudulent, unfair or unconscionable conduct causes him to be unjustly enriched at the expense of another to whom he owed some duty."

Wied cites no applicable authority to the contrary.

10. In contrast, in *Guth v. Loft*, *supra*, at page 510, the Court held:

> If an officer or director of a corporation in violation of his duty as such acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. *The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.* Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty. [Emphasis added.]

11. Following *Guth v. Loft* in *Brophy*, the Court of Chancery held (70 A.2d at page 8):

> . . . In equity, when *the breach of a confidential relation by an employee is relied on and an accounting for any resulting profits is sought, loss to the corporation need not be charged in the complaint.* Public policy will not permit an employee occupying a position of trust and confidence toward his employer to abuse that relation to his own profit, regardless of whether his employer suffers a loss. *Cf. Loft, Inc. v. Guth, supra*; *Guth v. Loft, Inc., supra.* [Emphasis added.]

12. The Court cites for its statement of the applicable rule the case of *Adams v. Jankouskas, supra.* Slip Op., page 18. But *Adams* itself cites *Brophy* as supporting authority for the identical proposition which appears in the Court's Opinion (Slip Op., page 18). *See Adams v. Jankouskas, supra,* page 152. And *Brophy,* of course, rests upon *Guth v. Loft.*

13. *Brophy* clearly stands for the rule of law which the Trial Court should have applied below and which the Court should apply on appeal, namely, a representative plaintiff's accountability as a fiduciary for profits he obtains from a settlement does not depend upon whether or not the beneficiaries suffer a loss. *Guth v. Loft* and *Brophy* exemplify the principle of Delaware law which requires Valhi, having voluntarily assumed "the fiduciary relation," to account for *any* profit arising out of the settlement agreement in February, 1979, which Valhi entered into while serving as the representative plaintiff, without regard to whether or not Valhi's profit was "at the expense of, or to the prejudice of, PSA and its stockholders." Slip Op., pages 17-18. The departure in the Opinion from the principle set forth in *Guth v. Loft* and *Brophy* retreats from the holding of the Court in *Guth v. Loft* with its clear recognition that a constructive trust is indeed "the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty." *Guth v. Loft, supra,* at page 510. The

Court's holding in the Opinion would constitute a regrettable retreat from the standards the Court proclaimed in *Guth v. Loft* and the Court of Chancery followed in *Brophy* and the Court reaffirmed but a few months ago in *Weinberger*.

14. The principle of law which the Court enunciated in *Guth v. Loft* and the Court of Chancery followed in *Brophy* has its roots in *Meinhard v. Salmon*, N.Y.Ct. App., 164 N.E. 545, 546 (1929), and *Wendt v. Fischer*, N.Y.Ct.App., 154 N.E. 303 (1926), two opinions written by Mr. Justice Cardozo when he served as Chief Judge of the Court of Appeals of the State of New York. Mr. Justice Cardozo in *Wendt* firmly rejected the argument that a fiduciary did not have to account for his profit because the *cestui qui* had received more than he originally asked for the property, holding (154 N.E. at page 304):

> This is no sufficient answer by a trustee forgetful of his duty. *The law "does not stop to inquire whether the contract or transaction was fair or unfair.* It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case." *Munson v. Syracuse, G. & C.R. Co.*, [103 N.Y. 58, 59, 74]; *cf. Dutton v. Willner*, 52 N.Y. 312, 319. Only by this uncompromising rigidity has the rule of undivided loyalty been maintained against disintegrating erosion. [Emphasis added.]

15. Contrary to the statement in the Opinion that "Wied cites no applicable authority to the contrary" (Slip Op., page 18), in her Reply Brief before the Court, Mrs. Wied argued as her first point the applicability of *Guth v. Loft*, *Meinhard v. Salmon* and *Wendt v. Fischer*. *See* the Reply Brief, pages 7-11.

16. The Court cites *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-50 (1949), as support for the proposition "not that a fiduciary may not profit, but that a fiduciary in Valhi's position may not profit at the expense of those for whom he sues" (Slip Op., page 17). But nowhere in *Cohen v. Beneficial* does the Supreme Court hold or even intimate that a condition for the accountability of a representative plaintiff for any profit by the representative plaintiff is a demonstration that his profit came about "at the expense of, or to the prejudice of, [the beneficiaries for whom the representative voluntarily came forward to represent]." The holding of *Cohen v. Beneficial* is altogether consistent with the position Mrs. Wied took before the Trial Court and before the Court and with *Guth v. Loft* (337 U.S. at pages 549-550):

> The Federal Constitution does not oblige the State to place its litigation and adjudicating processes at the disposal of . . . a representative [plaintiff], at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent.

17. In ignoring *Guth v. Loft* the Court creates a strange dichotomy in the law applicable to fiduciaries. The Court holds a business person who serves as a director-officer of a corporation and thus is a fiduciary to a higher standard than it does a fiduciary who voluntarily invokes the processes and procedures and protection of the Courts of Delaware as a representative plaintiff. As to the businessman-fiduciary, the Court quite properly "extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation." *Guth v. Loft*, at page 510. But as to the representative plaintiff-fiduciary, the Opinion abandons the standard of "[extinguishing] all possibility of profit" and looks to determine if the profit was "at the expense of, or to the prejudice of" those on behalf of whom the fiduciary

sued. Slip Op., pages 17-20. Until the decision of the Trial Court there is no case in which any court anywhere at any time has ever permitted a representative plaintiff to negotiate and enter into a settlement agreement from which the representative plaintiff benefited, and which provided for the representative plaintiff's agreement to cooperate to cause the dismissal of the class claims with prejudice, and, thereafter, when the duplicity surfaces, retain a profit from the settlement. In the case of Valhi, its conduct as a representative plaintiff is all the more impermissible since at the very time it was negotiating the settlement for itself, it amended its complaint professing to the Trial Court its status as the representative plaintiff to continue to assert the class claims without a single word to the Trial Court that it was negotiating to abandon the class claims with prejudice. *See* paragraph 31, below.

18. One might quite appropriately expect that the Court would hold a representative plaintiff to an even stricter accountability than a business person since the representative plaintiff is directly answerable to the court once he volunteers as a representative plaintiff. E.g., he cannot come and go as he pleases (*see* Rules 23, 23.1 and 41); he must pay expenses for notices, etc. as the court directs (*Idem*); the court determines the compensation of his counsel and allowable expenses (*Rome v. Archer*, Del.Supr., 197 A.2d 49 [1964]; *Krinsky v. Helfand*, Del.Supr., 156 A.2d 90 [1959]). *Compare* the Court's condonation of Valhi's conduct as a representative plaintiff with the Court's recent Opinions condemning parties and attorneys where the Court found the conduct short of the standards the Court requires. *See In re John J. Green, Jr.*, Del.Supr., ____ A.2d ____ (1983) (Slip Op., July 26, 1983); *John J. Van Leeuwen v. The Gas Service Company*, Del.Supr., No. 204,1983, Moore, J. (July 6, 1983) (Oral Opinion); *Weinberger v. UOP, Inc.*, Del.Supr., *supra*; and *Bruce E. M. v. Dorothea A. M.*, Del.Supr., 455 A.2d 866 (1983).

19. The effect of the Opinion is to accept Valhi's argument (A223; A236-A240) that the presence of Mrs. Wied and the action she took "rectified" Valhi's abandonment of "the fiduciary relation" and "satisfied the requirements of justice." Slip Op., pages 16-17. Having remained in the case much against its will and having fought mightily to keep Mrs. Wied out in keeping with its secret agreement with PSA to cooperate to accomplish the dismissal of the class claims with prejudice (A89), Valhi by the Court's affirmance of the Trial Court's view of the case (see paragraph 32) may depart the litigation without accounting for its profit in an amount the Court does not consider because the Court applies a principle at odds with *Guth v. Loft*. But in its result the Court disregards the master fact that but for Mrs. Wied's coming forward, Valhi would never have rectified anything and the Trial Court as well as the Court would never have known of Valhi's egregious conduct as a fiduciary in violation of the standard the Court has heretofore applied to those who enter into "the fiduciary relation."

20. Because of the disparate standards for the conduct of one who holds "the fiduciary relation" which flow from the Opinion when compared to those the Court proclaimed in *Guth v. Loft* and its progeny, Mrs. Wied respectfully submits the Court should revisit its disposition in order "to secure or maintain uniformity in Supreme Court decisions." *See* Rule 4(f)(ii).

III

21. It is quite clear that stockholders who seek relief from alleged wrongdoing are increasingly turning to the courts of the States, a move the Federal courts encourage. *See Cort v. Ash*, 422 U.S. 66 (1975).

22. The most effective therapeutic device which the law has so far developed to address the substantive claims of corporate wrongdoing is the concept of repre-

sentative litigation. *See Foss v. Harbottle*, 2 Hare 461 (1843).

23. Through the years the courts of Delaware have achieved national recognition through the body of law which the courts have established in corporate law and which has far reaching effect throughout the nation. The influence of Delaware's decisional law is of increasing influence as the Court and Court of Chancery focus upon issues at the cutting edge of corporate law. The typical context in which the Court and the Court of Chancery address these issues is in representative litigation. *See Weinberger v. UOP, Inc.*, Del.Supr., 457 A.2d 701 (1983); *Zapata Corp. v. Maldonado*, Del.Supr., 430 A.2d 779 (1981); and *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278 (1978).

24. Given Delaware's premier position among all the States in corporate law, it is of exceptional importance that representative litigation involving Delaware corporations command the confidence of investors, a confidence which can only flow (1) from the belief that representative plaintiffs who enter into "the fiduciary relation" conduct themselves honorably and fairly in the interests of aggrieved stockholders and their corporations (2) coupled with the certainty that the courts of Delaware will compel the strict adherence "the fiduciary relation" imposes should the representative plaintiff depart from the observance of the standards of rectitude which must mark the conduct of those who enter into "the fiduciary relation."

25. Since the stockholders and class members are before the courts in representative litigation only through the representative plaintiffs who voluntarily come forward to press the claims for relief, stockholders and class members are dependent upon the courts to monitor the actions of parties who bring representative litigation. *See Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), *reh'g denied*, 445 U.S. 941 (1980); and *see Rome v. Archer, supra.*

26. Accordingly, the word which the Court puts abroad in its resolution of the instant appeal should signal the Court's determination to monitor all actions at any time of those who assume "the fiduciary relation" and to hold representative plaintiffs to strict accountability as the Court would hold any other fiduciary.

27. The Opinion does not hold accountable a representative plaintiff who at the moment of negotiating a settlement benefiting itself alone filed an amended complaint asserting claims on behalf of the class while abandoning the claims of the class *with prejudice* in the negotiations. *See* paragraph 31. Mrs. Wied respectfully submits the Court as part of its monitoring responsibility should impose upon representative plaintiffs at least the same standards of rectitude the Court imposes upon all persons who enter into "the fiduciary relation."

IV

28. Contrary to the Opinion, Mrs. Wied never sought an "*ex post facto* fairness hearing."

(1) The Opinion asserts that the "*ex post facto* Rule 23 fairness hearing" which the Trial Court held on April 14-16, 1981, was "in response to Wied's application" (Slip Op., page 14) and "was ordered by the Court in direct response to Wied's 'last resort' contention" (Slip Op., Page 18) and that "Wied cooperated, without objection, in the arranging and conduct of the hearing" (Slip Op., page 19). The Court concludes: "Dissatisfaction now with the result of the hearing is not sufficient ground for an apparently complete shift of position as to its propriety." Slip Op., Page 19. Were Mrs. Wied to have sought the "*ex post facto* Rule 23 fairness hearing" which the Trial Court held and then represented to the Court on appeal that she had not done so, she would have engaged in conduct which is dissembling in the extreme. But *see* Mrs. Wied's Reply Brief, pages 24-25.

(2) The fact is, contrary to the Court's assertions, Mrs. Wied did not seek "an *ex post facto* fairness hearing." The record reflects that Mrs. Wied consistently sought a hearing to determine Valhi's profit, a position altogether consistent with the Trial Court's view on October 30, 1979. A229-A230. By its rulings in its letter opinion, dated October 22, 1979, the Trial Court permitted Mrs. Wied to intervene and rescinded the Trial Court's Orders of February 1, 1979 and April 16, 1979. A220-A221. In an effort to avoid the effect of the Trial Court's rulings, Valhi on October 26, 1979, filed its Motion for Leave to Withdraw (A222-A224) in order to place itself in a position to go forward and conclude the settlement agreement and take the profit it stood to obtain without any accountability for its faithlessness as a fiduciary. On October 30, 1979, following argument before the Trial Court on October 29, 1979, the Trial Court ruled (A230):

> . . . action on such motion to withdraw must be deferred until Court-approved notice of such application is given to the stockholders of PSA and a time fixed for the Court to hear objections or suggestions of such stockholders as to the pending motion of Valhi, Rules 23, 23.1 and 21.
>
> Following such hearing, the Court will determine whether or not Valhi's motion for leave to withdraw as a plaintiff should be granted, and if so, on what terms and conditions, such as the possible right of the stockholders of PSA, other than the individual defendants, to share in the proposed settlement on which Valhi relies, on a trust theory.

(3) Thus, the hearing which the Trial Court clearly contemplated on October 30, 1979, was not a "fairness" hearing but, rather, a hearing directed to

the determination of what profit Valhi obtained from the settlement agreement. It is the hearing as to Valhi's profit which Mrs. Wied sought thereafter as is evident in the record. At no time did Mrs. Wied shift from that position.

(4) What happened next was not a shift by Mrs. Wied in her view of the case but, rather, a shift by the Trial Court as to its view of the case. *See* paragraph 32.

(5) Once the Trial Court shifted its view as to the litigation from that of a representative action where a representative plaintiff may not profit to one where the Trial Court regarded the action as a private action on the part of Valhi (*see* paragraph 32, below; A296-A297; A300-A303), the Trial Court determined that the appropriate hearing to take place would be a hearing which would address "the fairness of the contract price" (A335). Thereupon, the Trial Court directed Mrs. Wied "[to move] in writing for the scheduling of such a hearing" (A336).

(6) Pursuant to the Trial Court's September 22, 1980 direction, Mrs. Wied prepared, served and filed on October 6, 1980, her Motion for a Hearing and Approval of a Notice of the Hearing as Contemplated by the Court's Letter Opinion, Dated September 22, 1980. *See* Docket Entry No. 259. A reading of the Notice makes clear that Mrs. Wied contemplated a hearing date which would allow time "sufficient for the Court to resolve all disputes concerning the substance and form of the Notice which the class members should receive notifying them of the hearing." *Idem.*

(7) A reading of Mrs. Wied's proposed Notice of Hearing appended as Exhibit A to her Motion demonstrates why Mrs. Wied then anticipated that the Court would need time to resolve disputes concerning the substance of the Notice. In her pro-

posed Notice she set forth, consistent with all of her prior efforts, her view that the focus of the hearing should be upon the imposition of sanctions against Valhi. *Idem.*, Exhibit A, at page 7.

(8) The Court need only refer to the Notice which the Trial Court approved to see Mrs. Wied's consistent position for the April 14, 1981 hearing. A339-A340. At all times, Mrs. Wied's position was unequivocal that Valhi must disgorge the profit it had obtained and that the sole issue was that a representative plaintiff as a fiduciary may not make any profit.

(9) At the hearing, Mrs. Wied objected to any testimony concerning the issue of fairness. The Trial Court expressed its recognition and understanding of Mrs. Wied's position as the transcript of the hearing reflects (A347-A348):

> THE COURT: Well, there is an objection to the introduction of evidence of the claim that this is a good deal for PSA stockholders because of the contention that the fiduciary may not make any profit.
>
> Is that your point, Mr. Morris?
>
> MR. MORRIS: Yes, your Honor.
>
> THE COURT: Well, with that general objection, let's proceed with the testimony.

(10) Given the foregoing record, the Court should not discredit Mrs. Wied with responsibility for the *ex post facto* fairness hearing.

29. Contrary to the Opinion, neither Valhi nor PSA made "complete disclosure."

(1) The Opinion says that PSA's Press Release and information letter to PSA stockholders of February 21, 1979, "constituted a complete disclosure to PSA stockholders (including Wied) of Valhi's action and intentions, as did the prompt notification to the Trial Judge by counsel on the very next day." Slip

Op., page 14. In so stating the Opinion ignores two master facts: (a) at no place in either the Press Release (A98) or the letter (B683) is there a statement that Valhi is exchanging stock which cost it approximately $12,000,000 and which had a market value of $11,900,000 (A84-A85) for stock of a company holding four unencumbered aircraft with a projected valuc between $26,000,000 and $30,000,000 in the Spring of 1981 (A83) and, in addition, holding a lease of the four aircraft for an eighteen month period until the Spring of 1981 providing for a rental income of $8,712,000 (A97); (b) at no place in either the Press Release (A98) or the letter (B683) is there a reference to Valhi's commitment as the class representative to cooperate to cause the dismissal with prejudice of the class claims (A88).

(2) The fact is Valhi did not lodge the redemption agreement or any of the settlement papers with the Trial Court until after Mrs. Wied had appeared in August, 1979, to protest what had occurred. "Complete disclosure" surely required delivering to the Trial Court a copy of the basic documents which disposed of the representative litigation. Valhi's withholding of the redemption agreement and the other settlement documents was obviously a deliberate act. The redemption agreement contained Valhi's agreement to act to dismiss with prejudice the very claims it had for months represented to the Trial Court and the class members it would prosecute on their behalf. Delivery of the redemption agreement to the Trial Court and the Trial Court's reading of it would have disclosed Valhi's faithlessness, an exposure Valhi did not want.

(3) So far as the "complete disclosure" to the Trial Court on February 22, 1979 is concerned, Valhi's failure to disclose material facts is encompassed within the conduct the Trial Court itself said

"cannot be condoned." A366. Had Valhi told the Trial Court on February 22, 1979, the material facts that the settlement of this representative suit provided that Valhi would exchange its stock with its market value of $11,900,000 for stock of a company with assets with a value of $34,900,000 to $38,000,000 and that the settlement committed Valhi to cooperate to dismiss the class claims with prejudice, can there be the slightest doubt that the Trial Court would have on the spot expressed its disapproval?

(4) The Press Release and the letter fell far short of the candor the Court uniformly requires. *See Weinberger v. UOP, Inc., supra,* at page 710; *Lynch v. Vickers Energy Corp., supra,* at page 281; and *see* paragraph 18.

30. Contrary to the Opinion, Valhi left the class members without recourse by its abandonment of the class claims without notice to the class members.

(1) After saying, "[N] or were other PSA stockholders left without recourse" (Slip Op., page 14), the Court summarizes what took place without once referring to Valhi's conduct other than to conclude, "And Valhi remained in the case throughout." Slip Op., page 14. The fact is Valhi, the fiduciary, left the class members without recourse by its agreement (A89) and its amendment to the complaint, saving the claim for itself for use in the event the settlement which benefited only Valhi fell through. *See* Valhi's Amended Complaint, filed April 16, 1979, page 1 of which appears at A43 and pages 2-15 of which appear at A67-A80; and *see* paragraph 31(7).

(2) The Court notes that Mrs. Wied "was permitted to intervene as party plaintiff, and her counsel designated as lead counsel" (Slip Op., page 14) without referring to the strenuous objection Valhi made to the presence of Mrs. Wied and her effort to intervene. A220-A221.

(3) Moreover, one would not learn from the Court's Opinion (Slip Op., page 14) that the Trial Court's striking of the Amended Complaint and the reinstatement of the original complaint were over Valhi's vigorous objection. A220-A221.

(4) Valhi's remaining in the case had precious little to do with Mrs. Wied's prosecution and settlement of the representative claims.

(5) With reference to Mrs. Wied's seeking the "*ex post facto* Rule 23 fairness hearing," the record is contrary to the Court's view of the matter (*see* paragraph 28) in that the Court mistakes the nature of the hearing Mrs. Wied consistently sought and her opposition to the *ex post facto* fairness hearing both before the hearing and during the hearing, and, to boot, ignores the Trial Court's shift in its view of the case from one recognizing its representative nature to one regarding it as an individual action. *See* paragraph 32. When Valhi wanted to withdraw, Valhi wanted to do so without any hearing. *See* Valhi's Motion for Withdrawal, etc., at paragraph (3) thereof. A224. Only when the Trial Court shifted to a view that the case "really" was one of the *Cheff v. Mathes* variety did Valhi (not Mrs. Wied) embrace the *ex post facto* fairness hearing concept. *See* paragraph 32.

31. Contrary to the Opinion, there was a causal relationship between Valhi's conduct as the representative plaintiff and the settlement agreement providing for a benefit to Valhi alone.

(1) The Court claims that "[h]ere there was no evidence of causal or other type of relationship between the asserted violation of the Rules and the proceeds of the stock redemption." Slip Op., page 14. The Court in so holding ignores the master fact in the record that at the very time Valhi was negotiating the settlement with its abandonment of the class claims on January 30-31, 1979 (A61-A65;

A89), Valhi retained the class claims in its Amended and Supplemental Complaint. *See* Valhi's Amended and Supplemental Complaint, filed January 13, 1978 (the first page of which appears at A66 and pages 2-17 of which appear at A44-A59).

(2) At the time the Trial Court permitted the amendment without objection by PSA on February 1, 1979 (*see* Docket Entry No. 86), Valhi did not disclose the negotiations then taking place with PSA. A139-A141.

(3) By dropping the derivative allegations from the amended complaint on February 1, 1979, Valhi eliminated an impediment to going forward to trial as the Federal court in California found and as the Court noted. *See* Slip Op., page 15. But the class claims remained at Valhi's deliberate election. A66; A44-A59.

(4) The question then is: "Why would Valhi retain class claims while Valhi was in the midst of settlement negotiations which were directed solely to a buying out of Valhi and did not consider providing any benefit to the class members?" The answer is Valhi knew PSA wanted a dismissal with prejudice of the class claims (A179) and, accordingly, knew that retaining the class claims added leverage to Valhi's bargaining position in the ongoing settlement negotiations.

(5) In the settlement agreement, Valhi agreed to cooperate to cause the dismissal with prejudice of the class claims (A89), thus abandoning the class members it had represented to the Trial Court it would represent by the filing of the amended complaint the Trial Court permitted on February 1, 1979.

(6) It is difficult to conceive of stronger evidence to demonstrate a causal relationship between a breach of "the fiduciary relation" and the securing of a personal benefit than a representative plaintiff's

negotiating for and then entering into an agreement which abandons the class claims while providing for a benefit to the representative plaintiff alone, and, at the same time representing to the Court of Chancery and the class that the representative plaintiff is pursuing the class claims in the representative litigation.

(7) Valhi's abandonment of the claims of the class members (A89) contrasts sharply with Valhi's retention of the same charges of wrongdoing when it filed its amended complaint on April 1, 1979, as an individual action. A43; A67-A80. Obviously, Valhi thought enough of the merit of the claims to retain them for use if the settlement fell through, a fact which constitutes further proof that the abandonment of the class claims was a factor in the settlement Valhi negotiated for itself. Thus, the representative litigation served as the vehicle by which Valhi positioned itself to make a profit on its PSA stock.

(8) The Opinion does not take into account the foregoing record facts in concluding that there is no causal relationship between Valhi's acts and its profits.

32. Contrary to the Opinion, the record does not support the Trial Court in its view of the issues "at the outset" of the case as the Trial Court claimed in its Letter Opinion, dated February 26, 1982, which the Court accepted in the Opinion.

(1) Quoting the Trial Court (A363), the Opinion accepts what the Trial Court claims were "the issues at the outset of this case." Slip Op., page 5.

(2) The fact is that Valhi did not tender a single one of the "1982" issues in Valhi's representative complaint filed October 30, 1978. *Compare* A16-A29 with A363.

(3) By adopting as fact the Trial Court's view of the case which the Trial Court expressed in its Let-

ter Opinion, dated February 26, 1982, one converts the representative litigation which Valhi brought into an individual action by Valhi free of all the standards applicable to those who enter "the fiduciary relation."

(4) The fact is that not until February 29, 1980, does the record reflect that anyone thought the action was anything but the representative action it was and is. On February 29, 1980, the Trial Court said (A296):

> THE COURT: Valhi against PSA. I think this will go on forever. Some cases seem to resolve themselves rather easily. Others are extremely difficult. This case I find very baffling, although it has recently occurred to me that what the case is concerned with is the use of corporate funds to buy out a stockholder who is not agreeable to the management of the defendant, PSA. In other words, the case is more along the lines of Coors against Carey, Bennett against Propp and Cheff against Mathes.

(5) Beginning February 29, 1980, the case changed from the reality of the representative action it was with Valhi as the fiduciary representative plaintiff having to account and permit other class members to share in the profit from the settlement it negotiated on a trust theory (A230), to the myth of an individual action where Valhi was free to settle and sell its PSA shares, as a businessman rather than a fiduciary, for the best price it could obtain. A361-A368.

(6) Only by shifting its view of the litigation from the representative action Valhi brought to an individual law suit which Valhi did not bring could the Trial Court reach the conclusion it did. The significance of the error is critical.

(7) The pervasive effect of the shifted view is nowhere better illustrated than by the Trial Court's view of the profit Valhi made in its settlement with PSA. By permitting Valhi to ignore "the fiduciary relation," the Trial Court concluded that Valhi did not profit. In doing so, the Trial Court ignored the $8,712,000 of income Valhi stood to gain from the lease it negotiated as part of the settlement in addition to the value of the four aircraft, viewing the entire transaction as if Valhi was an individual entrepreneur. A365.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

Irving Morris and Kevin Gross, as members of the Bar of the Supreme Court of the State of Delaware and officers of the Court, do hereby certify this 12th day of August, 1983, pursuant to Rules 18 and 4 of the Supreme Court, that they submit the foregoing Motion for Reargument Pursuant to Rule 18 and Motion for Rehearing *En Banc* Pursuant to Rule 4 in good faith and not for delay.

/s/ IRVING MORRIS
Irving Morris

/s/ KEVIN GROSS
Kevin Gross

IN THE
COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

VALHI, INC., a Delaware Corporation,	)	Civil Action No. 5730
Plaintiff,	)	
v.	)	
PSA, INC., a Delaware Corporation,	)	MOTION TO INTERVENE
Defendant.	)	

Barbara J. Wied, by her attorneys, Morris and Rosenthal, P.A. and Milberg, Weiss, Bershad & Specthrie, respectfully moves for leave to intervene as a party plaintiff in this action pursuant to Rule 24(a) of the Rules of this Court, for the limited purpose of requesting the Court to vacate the Orders entered herein on February 1, 1979, and April 16, 1979, and to strike the Orders and the respective amended complaints filed pursuant thereto. The grounds for this Motion are:

1. The movant is, and at the time of the transactions and events material hereto was, a stockholder of the defendant, PSA, Inc. ("PSA").

2. The instant action was filed on or about October 30, 1978, by plaintiff, Valhi, Inc. ("Valhi"), against PSA and the individual directors of PSA. Valhi brought the action "derivatively on behalf of PSA . . . and as a class action pursuant to Rule 23 of the Rules of the Court of Chancery on behalf of all stockholders of PSA similarly situated", alleging that "Valhi will fairly and adequately protect the interests of the class" and that a "class action is superior to other available methods for the fair and efficient adjudication of this action." In the Complaint, Valhi complained of harm to PSA and to PSA's common shareholders and sought monetary and other relief on behalf of PSA and the class. Periodically thereafter in pleadings and orally to the Court Valhi affirmed the fidu-

ciary character of its representation as plaintiff in this derivative and class action. Moreover, in proxy materials which Valhi submitted to PSA stockholders in November, 1978, in the course of Valhi's solicitation of their votes in the proxy contest with PSA's management, Valhi disclosed and represented that it had filed the instant action as a derivative and class action.

3. At least by December 20, 1978, Valhi and PSA and the individual director defendants engaged in settlement discussions which by January 29, 1979, had advanced to the point where " . . . although agreement in principle had not yet been reached, the primary points of the business transaction had sufficiently evolved through negotiations to date that it was thought appropriate for the Board of Directors of PSA to consider the matter at this time." See PSA Board of Directors Minutes, January 29, 1979, page 1, a copy of which is attached hereto as Exhibit A. The Board of Directors of PSA on January 29, 1979, considered and unanimously adopted two resolutions, as follows:

> "RESOLVED, that management and counsel are hereby authorized to continue the present negotiations with Valhi, looking toward a transaction which would completely sever and resolve the relationships and disputes between this corporation and Valhi, and to present to this Board of Directors for its final approval a definitive form of agreement or agreements with Valhi effecting such a transaction;
>
> RESOLVED, FURTHER, that the primary terms of the proposed transaction, as presented to and discussed with this Board of Directors, be and the same hereby are, approved in principle, subject to the review of and final approval of this Board of Directors of a definitive agreement consistent with such terms."

4. On January 30 and 31, 1979, Valhi and PSA and the individual director defendants directly or by their re-

spective attorneys or other representatives engaged in all-day settlement discussions in Los Angeles, California, at the offices of Latham & Watkins. The terms of settlement which PSA approved on January 29, 1979, and which were discussed on January 30 and 31, 1979, were substantially the same as those reflected in the Valhi-PSA agreement of February 21, 1979, ("the Agreement").

5. The terms of the settlement discussed on January 30-31, 1979, between Valhi and PSA and the individual director defendants provided for certain specific consideration of substantial value to flow to Valhi in exchange for the selling by Valhi of its PSA shares to PSA and Valhi's cooperation in terminating the instant litigation in a manner and form which would leave PSA's then and present management in continued control of PSA. The Agreement provides for Valhi to sell to PSA 700,000 shares of PSA common stock for which Valhi paid approximately $12,000,000 in exchange for PSA assets which are presently worth between $32,000,000 and $36,000,000, according to a February 1979, appraisal secured by PSA from E. F. Hutton & Company, Inc. Not one element of the terms of the settlement redresses the claims of wrongdoing alleged derivatively and as a class action in the Complaint.

6. By the end of the negotiations of January 31, 1979, the parties had either orally reached agreement or had progressed that far in their negotiations that the matter or matters in dispute could not seriously be regarded by either Valhi or PSA as barring the way to an agreement between them.

7. On February 1, 1979, the parties by their attorneys appeared before the Court on Valhi's Motion for Leave to file an Amended and Supplemental Complaint ("the Second Complaint"). In the Second Complaint, Valhi proposed to exercise all of its derivative allegations and to eliminate as party defendants the PSA directors

Valhi had named in the Complaint. Prior to February 1, 1979, PSA and the individual director defendants by their counsel had advised Valhi's counsel that they had no objection to the granting of Valhi's Motion.

8. At no time either prior to or during the conference and hearing with the Court on February 1, 1979, did either Valhi or PSA by their attorneys inform the Court of the settlement negotiations between them although the attorneys knew of these settlement negotiations.

9. By failing to disclose to the Court the fact of the settlement negotiations and the then precise status of those negotiations, including the fact that under the proposed settlement substantial material benefits would flow to Valhi which no other PSA stockholder would share in, Valhi and PSA and the attorneys who represented them before the Court on February 1, 1979, thereby violated Rule 23.1.

10. Significantly, Valhi did not make the showing required by Rule 23.1 that nothing of value had been received by it or promised to it; in the absence of such a showing Rule 23.1 requires notice before derivative claims may be dropped. Given the negotiations between Valhi and PSA as of January 31, 1979, their then status and the benefits which Valhi, it is now known, expects to receive, it is not surprising that Valhi and its attorneys were unwilling to make the required showing. Valhi's failure to make the required showing constitutes such an extreme and serious violation of Rule 23.1 as to warrant the vacating of the Order of February 1, 1979, without more.

11. On February 1, 1979, the Court entered the Order prepared by Valhi granting Valhi leave to file the Second Complaint. In violation of the Rules of this Court and the rights of PSA and its stockholders, no notice of the filing of the Second Complaint, the deletion of the derivative allegations, or the elimination of the PSA di-

rectors as individual defendants was given to the shareholders of PSA.

12. Rule 23.1 and its predecessors was initially promulgated many years ago to put an end to "strike suits", i.e., suits which unscrupulous persons would file against corporations and which they and their attorneys would settle and dismiss pocketing what they could get for themselves from the corporate defendants or what defendant directors would pay them without any benefit flowing to the corporation in a derivative case or the class members in a class action. By compelling Court approval before dismissal of derivative claims and only upon notice to the stockholders, Rule 23.1 made it impossible for the avaricious to ply their trade in derivative suits.

13. For Rule 23.1 to work, however, to the end that Courts may discharge their supervisory responsibility, Courts necessarily depend upon the attorneys for the parties before the Court to make that full disclosure mandated by Rule 23.1 not only by its express language but by the spirit which motivated the adoption of the Rule. For lawyers thoroughly conversant with Rule 23.1, its origins and purpose to be less than candid with the Court as they ask the Court to act under the Rule crosses the line of permissible advocacy.

14. On February 21, 1979, Valhi and PSA entered into a written Agreement of Settlement and on February 22, 1979, Valhi's counsel advised the Court of that fact. The settlement terms provided only for benefits to Valhi and did not provide for any benefits to any other member of the class. At no time did either Valhi's or PSA's attorneys at the conference with the Court on February 22, 1979, make reference:

(1) to the fact settlement negotiations between Valhi and PSA had taken place substantially before and on January 30-31, 1979, prior to entry of the Order on February 1, 1979;

(2) to the fact the terms of the February 21, 1979, Agreement were the same as those discussed between Valhi and PSA on January 30-31, 1979;

(3) to the fact that Valhi and PSA in their Agreement agreed as follows:

> "Valhi and PSA shall cooperate to accomplish to the extent possible the dismissal with prejudice of the Delaware action as to the purported plaintiff class on the closing date."

15. Thereafter, as set forth in the Order entered herein on April 16, 1979, Valhi and PSA agreed to the filing by Valhi of yet another amended complaint ("the Third Complaint") which was "deemed to be filed as of the date of this Order [i.e., the Order of April 16, 1979] without further service and filing thereof." The Third Complaint deleted the class action allegations that were contained in the Complaint and the Second Complaint, but made no other charge. In violation of the Rules of this Court and the rights of the class members no notice of the filing of the Third Complaint or the deletion of the class action allegations contained in the prior complaints was given to the PSA shareholders.

16. If Valhi and PSA had made the disclosures set forth in paragraph 14 hereof to the Court, the petitioner respectfully submits that the Court would not have permitted the excision of the class action allegations by the filing of the Third Complaint without requiring Valhi and/or PSA to give notice to the class members, i.e., the public stockholders of PSA.

17. Rule 23(e) of the Rules of the Court of Chancery, governing a dismissal or compromise of a class action, unlike its counterpart in the Federal Rules of Civil procedure, contains the following language not found in Federal Rule 23(e):

> "... except that if the dismissal is to be without prejudice to the class or with prejudice to the plain-

tiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made."

By incorporating the foregoing language in Delaware Rule 23(e), which language appears as well in Delaware Rule 23.1 (and, incidentally, does not appear in Federal Rule 23.1), it is respectfully suggested that it was the clear intent of the Court to accomplish two purposes, namely:

(1) to make certain that a strike suiter and his attorneys could not profit by a class action any more than he and they could in a derivative action;

(2) to provide a method for the dismissal of a class action without notice where the Court was satisfied that the class representative and his attorneys would not profit from having instituted the action they wanted to dismiss without benefit to the other class members.

18. By urging and securing the entry of the Orders of February 1, 1979, and April 16, 1979, Valhi has breached the fiduciary responsibilities it undertook when it filed the Complaint alleging wrongdoing both derivatively and as a class action against PSA and the individual director defendants and the Board of Directors of PSA has violated its fiduciary responsibilities to PSA and its public stockholders. Both Valhi and PSA have so acted as to warrant the censure of the Court in securing and participating in the entry of the Orders of February 1, 1979, and April 16, 1979.

WHEREFORE, Barbara J. Wied moves that the Court enter an appropriate Order as follows:

(1) Granting Barbara J. Wied leave to intervene as a party plaintiff pursuant to Rule 24(e) of the rules of this

Court for the limited purpose of requesting the Court to vacate the Orders entered hereon on February 1, 1979, and April 16, 1979.

(2) Striking the Orders entered herein on February 1, 1979, and April 16, 1979, and the respective amended complaints filed pursuant thereto.

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